Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1995

RONALD C. BROWN, SUZANNE M. BROWN, JASON P. MESITI, by next friends Ronald C. Brown and Suzanne M. Brown, *et al.*,

Petitioners,

v.

HOT, SEXY AND SAFER PRODUCTIONS, INC., SUZANNE LANDOLPHI, THE CHELMSFORD SCHOOL COMMITTEE, *et al.*,

Respondents.

Petition For A Writ Of Certiorari to The United States Court Of Appeals for The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE RELIGIOUS FREEDOM AND RIGHT OF PARENTS TO DIRECT THE UPBRINGING AND EDUCATION OF THEIR CHILDREN, AS RECOGNIZED BY THIS COURT'S DECISIONS AND BY STATE EDUCATIONAL POLICIES, MUST EXTEND TO THE RIGHT OF PARENTS OF PUBLIC SCHOOL CHILDREN TO OPT THEIR CHILDREN OUT OF SEXUALLY EXPLICIT AND PROFANE PERFORMANCES THAT ARE NOT INTEGRAL TO THE TEACHING OF HEALTH CLASSES.

2. WHETHER A VALID CLAIM IS STATED UNDER 42 U.S.C. § 1983 WHEN THE HIGHEST-RANKING ADMINISTRATIVE OFFICIALS OF A PUBLIC SCHOOL, IN CONCERT WITH ELECTED SCHOOL COMMITTEE MEMBERS, FORCE PUBLIC SCHOOL CHILDREN TO ATTEND A SEXUALLY EXPLICIT AND PROFANE PERFORMANCE WITH NO ADVANCE NOTICE TO PARENTS, AS REQUIRED BY LAW.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties to the proceedings in the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit: Carol Dubreuil, Richard Dubreuil, Shannon Silva, by next friends Carol Dubreuil and Richard Dubreuil, and Wendy Marcks, individually and in her official capacity, Mary E. Frantz, individually and in her official capacity, Richard H. Moser, individually and in his official capacity, David S. Troughton, individually and in his official capacity, George J. Betses, individually and in his official capacity, Michael Gilchrist, M.D., individually and in his official capacity, and Judith Hass, individually and in her official capacity.

Petitioners are individuals and have no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion and order of the United States District Court for the District of Massachusetts, dated January 19, 1995, is attached at Appendix A. The final judgment of the United States District Court for the District of Massachusetts, dated March 3, 1995, is attached at Appendix B. The judgment and opinion of

the United States Court of Appeals for the First Circuit, dated October 23, 1995, is attached at Appendix C.

JURISDICTION

This case seeks review of a decision of the Court of Appeals for the First Circuit entered on October 23, 1995. This is a civil case. Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . .

STATEMENT OF THE CASE

On April 8, 1992, Petitioners Jason P. Mesiti and Shannon Silva, 15 year old public high school students, were forced to attend one of two performances entitled "Hot, Sexy and Safer," presented by Respondent Suzanne Landolphi. No notice was given to parents of the students that this program was to be presented, and no consent was obtained from said parents.

The performance consisted of simulations and explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy and testicles, the homosexual lifestyle, and premarital heterosexual conduct by minors. Respondent Landolphi called randomly on the students in the audience, and insisted that some students join her on stage as foils for her obnoxious and degrading "experiments." Further, statements regarding risky sexual practices and lifestyles were made in such a manner as to encourage a belief in impressionable teenagers that such behavior was not only "cool," but that the consequences may not be as dire and irreversible as they actually are.

Suit was filed by Petitioners against Respondents on August 24, 1993, and an Amended Complaint was filed on December 14, 1993. Petitioners attached and incorporated by reference to their Amended Complaint a transcript of the entire Hot, Sexy and Safer performance, attached herein as Appendix D. Subject matter jurisdiction was conferred on the District Court by 28 U.S.C. § 1331(a). On January 19, 1995, the District Court issued a Memorandum and Interlocutory Order dismissing Petitioners' case without requiring the filing of an Answer to the Complaint or permitting Discovery. The District Court held that no privacy right had been violated, that the behavior of Respondent Landolphi did not " shock the conscience," that due process was not violated, and that no constitutional or statutory right to free exercise of religion had been violated. Final judgment was entered by the District Court on March 3, 1995.

Petitioners properly appealed the decision to the United States Court of Appeals for the First Circuit which, on October 23, 1995, affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

There are compelling reasons why this Court should grant certiorari in the instant case, in that this case presents questions of major importance to parents, students and public school officials nationally[1] .

The judgments of the lower courts in the instant case are in direct conflict with prior important rulings of this Court which clearly establish the fundamental nature of the constitutional right of parents and families to guide and direct the education and upbringing of their own children. The consistent and clear position of this Court that no child is a mere creature of the State is undermined by the decision of the lower court in the instant case, and Petitioners submit that this Court has a compelling interest in reiterating the importance of the family and the need for cooperation with the family on the part of school officials throughout the circuits.

Further, this Court should grant certiorari in order to resolve the conflict between the decision in the instant case with important rulings of Courts of Appeal in other circuits, and to provide guidance on an issue of paramount importance in federal law. Absent review by this Court, the decision in the instant case stands as an authority for disruption of the balance of interests between parents and public school officials, thus further weakening the family in an area which is under review by courts and legislatures around the nation. This Court therefore has a compelling reason to grant certiorari.

These reasons for granting certiorari are further expanded hereafter in this Petition.

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[1] This case has already been the subject of national comment. See J.J. Kilpatrick, *Sex and Schools -- What are Students' Rights?*, The Post and Courier, Charleston, S.C., December 2, 1995 (19A).

I. WHERE THIS COURT'S DECISIONS AND THE STATE'S OWN EDUCATIONAL POLICIES RECOGNIZE THE RELIGIOUS FREEDOM AND RIGHT OF PARENTS TO DIRECT THE UPBRINGING AND EDUCATION OF THEIR CHILDREN, THAT RIGHT MUST EXTEND TO THE RIGHT OF PARENTS OF PUBLIC SCHOOL CHILDREN TO OPT THEIR CHILDREN OUT OF SEXUALLY EXPLICIT AND PROFANE PERFORMANCES THAT ARE NOT INTEGRAL TO THE TEACHING OF HEALTH CLASSES.

> The policy of Respondent Chelmsford school committee states:
>
> Positive subscription, with written parental permission, will be a *prerequisite* to enrolling [in health education curricula.]

Brown, 68 F.3d 525, 535 (1995), quoting *IGAI; Sex Education* (emphasis added).

In delineating this policy, Respondent officials themselves recognized the fundamental right of parents to direct the education and upbringing of their own children, a right which this Court has consistently upheld [2]. Were this right not to include a right to opt out of profane and sexually explicit performances within the school walls, it would be a hollow one indeed.

(a) Federal courts are bound to follow precedent established by this Court regarding the nature of the constitutional right of parents to direct the education of their children.

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary

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[2] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

> function and freedom include preparation for obligations the state can neither supply nor hinder.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944). In *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), this Court, in quoting the above, reiterated the importance of the primary role of parents in the nurturing of their children.

This Court does not make statements of mere sentiment. The opinions in *Prince* and *Ginsberg* were an affirmation of the underpinnings of the American Constitution and the fundamental nature of family rights, which are "deeply rooted in the Nation's history and tradition." (*Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).)

The right of families to guide and direct their internal relationships is a "fundamental liberty interest protected by the Fourteenth Amendment," as this Court held in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). *Santosky* followed a venerable line of cases in which the family was recognized as a right of first importance by this Court, including *Meyer v. Nebraska*, 262 U.S. 390 (1923), where this Court held that the right to establish a home and bring up children is an essential part of the liberty interest guaranteed by the Fourteenth Amendment. And in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court held unconstitutional an Oregon statute which prohibited parents from sending their children to private schools, because such a legislative act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-545.

Respondent state actors who staged the compulsory Hot, Sexy and Safer performance substantially burdened religious freedom and infringed on the rights of parents to direct the upbringing and education of their children. At the very least, school officials infringe upon this right when their advocacy of sexually explicit programs within the public schools is imposed on minor students without notice or warning, when this advo-

cacy offends and undermines the very essence of the moral and religious teachings of the minor child's parents, when the child has no opportunity to escape the forced instruction, when the school officials violate their own stated policies, and when the purported "instruction" subjects the child to humiliation and embarrassment.

This Court has expressed "heightened concerns" for protection of a student's freedom of conscience from even "*subtle* coercive pressure in the elementary and secondary schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (emphasis added). The Court found it "undeniable" that a "school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students" who are required to stand during a nonsectarian prayer. There was nothing subtle about the coercive pressure imposed on Petitioner students to attend.

One of the most eloquent statements of the dangers inherent in permitting rulings such as that in the instant case to stand is contained in the decision of the court in *Valent v. New Jersey State Board of Education*, 274 A.2d 832 (N.J.Super.Ch.Div. 1971):

> Is the State, through the educational system, permitted to encroach upon the patterns and molding of a child's behavior in personal, family or religious beliefs? Parental discipline, authority and respect diminish as the great sovereign state forces its way into the home as a foster parent. Some parents may be happy to be relieved of the obligation and responsibility. Others may feel that the constant eroding of their usefulness as parents portends great danger, and youth will look to the state rather than the parent, for guidance.

Id. at 839. This Court has consistently held that the answer to the question posed here is a resounding "No!"

" The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Thus, when a conflict arises between the rights of individuals and the actions of schools administrations, this Court has consistently made its position clear. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969).

In the instant case, Respondent officials misused their authority and control over students to coerce them to accept the profanity and advocacy of premarital heterosexual and homosexual conduct, in violation of their own and their parents' moral and religious beliefs. This abhorrent and unnecessary indoctrination burdened Petitioners' belief that adherence to a moral way of life and the teachings of their religion regarding sexual morality is essential to their way of life. *See Yoder*, 406 U.S. at 217 (1972).

Where the contentious issue of sex education is concerned, it is especially important that schools work *with* parents to ensure that what is presented to the children is evenly balanced, clearly expressed, capable of comprehension in an appropriate context, and in accordance with the values of the family in which the child resides.

It is arrogant to conclude that schools "know best" for children in matters involving sexual conduct and morality, and that the rights of all parents are jettisoned at the school threshold. The instant case illustrates the inevitable result of unchecked arrogance by school officials. Respondent Landolphi told Petitioner students: "[Y]our school had the balls to bring me here, so you thank them." (Appendix D-61) Respondent officials had no doubt about the nature of the performance. They chose to violate the rights of students and families, and their own

policies, by forcing minor students to attend. This abuse was a violation of the rights of parents and students.

(b) The performance presented by Respondent Landolphi in "Hot, Sexy and Safer" meets the test of objectionable material subject to parental consent requirements and was not necessary to the health education of the students of Chelmsford High School.

As this Court has previously stated:

> A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 685 (1986). The Court recognized that even sexually suggestive innuendo "could well be seriously damaging to its less than mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality." *Id.* at 683. The Court noted that its prior decisions:

> recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children -- *especially in a captive audience* -- from exposure to sexually explicit, indecent, or lewd speech.

Id. at 684 (emphasis added).

In the instant case the school officials were entirely responsible for the forced participation of the student audience in a sexually explicit stage performance entitled a "group sexual experience" by Respondents. Such a performance cannot legitimately be categorized as the fulfillment of a "compelling state interest."

This Court held in *Bethel* that spoken language depicting "'sexual and excretory activities in a patently offensive manner . . . broadcast at a time when children were undoubtably in the audience'" may properly be considered "'obscene, indecent and profane'". *Bethel* at 684-85, quoting *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 739, 741 (1978). The *Pacifica* case clearly sought to strengthen parents' ability to supervise children, while simultaneously protecting children from indecency. *See Action for Children's Television v. F.C.C.*, 58 F.3d 654, 661 (D.C. Cir. 1995), *cert. denied* 64 USLW 3484 (January 16, 1996). The decision of the lower courts in the instant case conflicts with both objectives.

In 1995 this Court again recognized the duty of school officials, as adults acting *in loco parentis*, to properly carry out their duty "'to inculcate the habits and manners of civility." *Vernonia School District v. Acton*, 115 S.Ct. 2386, 2392 (1995), quoting from *Bethel*, 478 U.S. at 681.

In presenting her performance to the Chelmsford students, Respondent Landolphi repeatedly advocated casual sexual behavior, both heterosexual and homosexual, used obscene language and gestures to describe sexual organs before and during sexual intercourse, and involved students in demonstrations of sexual behaviors. For example:

> [I]f you guys drink a lot of beer before you try having sex -- "humph" -- it's going nowhere. (Holds arm out straight and dangles forearm at right angle.) (Giggle) Right? That's right. You might as well hang that one up for the night guys, 'cause it isn't going to happen. You know what I'm saying? You'd be offering it to her like this: (Cups hand at groin.) "Here honey, you want to take this? " (Bends down between legs and pretends to pick up.) Oh wait. I dropped it, hang on. (Giggle) "Alrighty, take it."

Appendix D-9.

Such stage craft, presented by a performer with no professional qualifications, was introduced to Chelmsford public school students by the principal, and endorsed by the school physician as "educational" and "humorous." It is not necessary to require that students endure "adult entertainment" in order to provide health and sex education courses, and there is no compelling state interest in doing so.

Further, in their enthusiasm to be "humorous," Respondents promulgated misinformation. Respondent Landolphi made certain statements that can only be described as dangerous:

> When you get [the AIDS] virus . . . you're told a lot of negative things. Like the fact that you're going to die. WRONG . . . When you find out someone you love has this virus, you tell them they can fight this virus, and they might fight it so well that they may never get ill. That's a fact. We discovered you can do something, and its not a drug.
>
> * * *
>
> If you get rid of four things in your life, you will build up your immune system so strong that just maybe you'll never get AIDS. You will still have the virus in your body. You can still [pass it] on to someone else, but you might never get sick if you keep yourself healthy.

Appendix D-5 and D-6. In the Hot Sexy, and Safer performance, Respondent Landolphi also asserted that "drugs, alcohol, tobacco and stress" ruin the immune system, but that sexual activity could relieve stress (Appendix D-12).

To advise teenagers today that they can behave in such a manner that they contract the AIDS virus (which was the context in which these statements were made), and not suffer fatal consequences, certainly amounts to educational malpractice and medical recklessness. That school officials would force stu-

dents to attend this exhibition of obscenity and inaccuracy states a claim for relief under 42 U.S.C. § 1983 which should not have been peremptorily dismissed.

(c) **By denying parents the opportunity to opt their children out from the performance, school authorities violated the constitutional rights of parents and students, as well as established legal precedent.**

> The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.

Wyatt v. Cole, 504 U.S. 158, 161 (1992), citing *Carey v. Piphus*, 435 U.S. 247 (1978).

Although compulsory sex education programs in public schools have been upheld by the courts, there has been a clear line drawn between compulsory programs which provide an opt-out opportunity and those which do not. It is in recognition of this line that school policies, such as that enacted by the Chelmsford authorities, provide for parental notification and consent for pre-planned events such as the Hot, Sexy and Safer performance.

In *Valent v. New Jersey State Board of Education* the court denied a motion for summary judgment, holding that the state must show an overriding need for compulsory sex education curricula and no other means of satisfying that need (274 A.2d 832 at 840). The court also suggested that an exemption from such curricula might be necessary in order to avoid unduly burdening those with objections to the program. *Id.*

Following this 1971 case, the Supreme Court of New Jersey held, in *Smith v. Ricci*, 446 A.2d 501 (N.J. 1989), that sex education regulations do not violate the Free Exercise or Establishment Clauses of the First Amendment *if* the program in-

cludes procedures whereby a pupil whose parent or guardian objects to part of the program could be excused without penalty. *Id.* at 505.

In *Medeiros v. Kiyosaki*, 478 P.2d 314 (Haw. 1970), the Supreme Court of Hawaii held that where parents do have an option to opt-out their children from sex education programs, their acknowledged constitutional rights to privacy and free exercise of religion are not violated. A similar holding was made by the California Court of Appeals in *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal.App.3d 1 (Cal.Ct.App. 1975), where the court held that the statutory right of parents to remove their children from objectionable courses, in whole or in part, fulfilled the duty of the state to protect their constitutional rights. The parents could not further demand that such courses be removed from the curricula of San Mateo public schools.

These cases from varying circuits are all predicated upon an accepted constitutional right of parents to direct the education of their children, and the concurrent right to remove those children from objectionable curricula. Other courts have discussed the connection between religious belief and exemption in even more detail.

The New York Court of Appeals, in the 1989 case of *Ware v. Valley Stream High School Dist.*, 550 N.E.2d 420 (N.Y. 1989), also refused to grant summary judgment to the school authorities. The court held that the claim of the Plymouth Brethren that "mere exposure" to AIDS education was "evil" and forbidden by their religious beliefs raised a disputed issue of material fact, and that summary judgment was therefore inappropriate. *Id.* at 430-31. Although the court acknowledged the state's compelling interest in educating its young about AIDS, it refused to conclude that the Plymouth Brethren were unworthy of an exemption. As the opinion stated, "the threat of

AIDS cannot summarily obliterate this Nation's fundamental values." *Id.* at 429.

The seminal cases of *Meyer*, *Pierce*, and *Yoder* state that a constitutional violation arises where public school authorities use coercion or misuse their authority to force compulsory attendance.

> Coercion exists where the governmental action is mandatory and provides no outlet for the parents, such as where refusal to participate in the program results in a sanction or expulsion.

Curtis v. School Committee of Falmouth, 652 N.E.2d 580, 586 (1995), *cert. denied*, 64 USLW 3456 (Jan. 8, 1996) (no constitutional protection for parents' rights, since students were not forced to take condoms and literature distributed in public school bathrooms and clinics).

II. WHEN THE HIGHEST-RANKING ADMINISTRATIVE OFFICIALS OF A PUBLIC SCHOOL, IN CONCERT WITH ELECTED SCHOOL COMMITTEE MEMBERS, FORCE PUBLIC SCHOOL CHILDREN TO ATTEND A SEXUALLY EXLICIT AND PROFANE PERFORMANCE WITH NO ADVANCE NOTICE TO PARENTS, AS REQUIRED BY LAW, A VALID CLAIM IS STATED UNDER 42 U.S.C. § 1983.

There is compelling reason why this Court should provide guidance to the federal courts concerning the proper application of the "random and unauthorized act" exclusion enunciated in*Parratt v. Taylor*, 451 U.S. 527 (1981), and cited at length by the Court of Appeals for the First Circuit.

(a) The actions of the Chelmsford school officials were not "random and unauthorized acts" within the meaning of *Parratt v. Taylor*.

In its opinion, the Court of Appeals discussed at length its interpretation of this Court's decisions in *Parratt* and *Hudson v. Palmer*, 468 U.S. 517 (1984). In those cases, this Court enunciated the principle that a State need only provide postdeprivation remedies when the State is not able to anticipate "random and unauthorized" conduct of its employees. *See Zinermon v. Burch*, 494 U.S. 113, 130 (1990).

This Court's ruling in *Zinermon* refined the so-called *Parratt-Hudson* doctrine by providing the analysis a court must use prior to the application of the "random and unauthorized act" exclusion. Petitioners respectfully submit that the confused misapplication of this analysis by the lower courts in the instant case clearly demonstrates a lack of understanding of this Court's ruling on the issue.

Under *Zinermon*, the first question a court must resolve is what is the constitutionally protected liberty interest at stake, and how that interest may be deprived by upholding the state action. As the appellate court noted in the instant case, Respondents conceded that "the Sex Education Policy confers a liberty interest in freedom from exposure to the content of the Program and in being afforded an opportunity to opt-out." *Brown*, 68 F.3d 525, 535 (1995).

Massachusetts law gives school committees ample power to set policies for schools in their district:

> The school committee in each city and town and each regional school district shall have the power to select and to terminate the superintendent, shall review and approve budgets for public education in the district, and shall establish educational goals and policies for the schools in the district consistent with the require-

ments of law and statewide goals and standards established by the board of education.

M.G.L. c. 71, § 37 (1995). *See Leonard v. School Committee of Springfield*, 135 N.E. 459, 461 (1922) ("The school committee is an independent body, entrusted by law with broad powers, important duties and large discretion.") As stated above, the Chelmsford school committee itself provided protection to Petitioners' liberty interest by requiring "[p]ositive subscription, with written parental permission' as a prerequisite to instruction in human sexuality." *Brown*, 68 F.3d at 535. [3]

Having identified the valid liberty interest of the plaintiffs, a court must next apply *Zinermon* to determine if the actions of a defendant that deprive a plaintiff of that interest violate the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

Zinermon analysis first requires an examination of whether "the deprivation of [a plaintiff's] liberty was unpredictable." *Zinermon*, 494 U.S. at 136. In the instant case, the deprivation of Petitioners' liberty interest was clearly foreseeable. The procedural safeguards established by the school committee to guard against these very types of erroneous deprivations of constitutionally protected rights estops Respondents from claiming unforeseeability. Properly used, these procedural safeguards would have prevented school officials from forcing students to attend the Hot, Sexy and Safer performance.

More importantly, the fact that these predeprivation procedures are practicable indicates, as does *Zinermon*, the inapplicability of *Parratt-Hudson*. *See Plumer v. Maryland*, 915 F.2d 927, 931 (4th Cir. 1990).

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[3] M.G.L. c. 71, § 1 (1995) also states that there is a right to opt out from "instruction on disease" to students whose "sincerely held religious beliefs" conflict with such instruction. The Court of Appeals in the instant case noted that the defendants assumed that this law was an "alternative source for the claimed liberty interest." *Brown*, 68 F.3d at 535, n.8.

The second part of the *Zinermon* analysis requires that the court inquire into whether "predeprivation process was impossible." *Zinermon*, 494 U.S. at 136. In the instant case, predeprivation process was not only possible, it was explicitly envisioned and outlined in the school authorities' own procedures. If the school committee "promised this much, it must have thought that this much was, at the very least, possible." *Gentry v. Lee's Summit*, 10 F.3d 1340, 1345 (8th Cir. 1993).

Finally, a court must answer the question of "whether [a defendant can] characterize their conduct as 'unauthorized' in the sense the term is used in *Parratt* and *Hudson*." *Zinermon*, 494 U.S. at 138. It is entirely clear that the conduct at issue in the instant case was not of a random, negligent nature, as in *Parratt*, nor yet the deliberate destruction of property by a spiteful prison guard, as in *Hudson*. In those cases, the level of unforeseeability of an individual actor's errant conduct renders predeprivation process impossible because the state was in no position to anticipate such conduct (*Zinermon*, 494 U.S. at 129-130). In the instant case, on the contrary, the conduct at issue was the premeditated, concerted conduct of a group of professional educators and administrators, elected school committee members, the school physician, and the PTO officer. The conduct was a clear policy choice made by Respondents, entirely authorized, and in no sense of the word analogous to the situations to which the *Parratt-Hudson* exclusion may apply.

In the instant case, Respondent school officials and committee members: (1) met with Respondent Landolphi; (2) contracted with Respondent Hot, Sexy and Safer Productions, Inc.; (3) scheduled the performances by Respondent Landolphi; (4) withheld disclosure from parents that their children would be forced to attend the Hot Sexy and Safer performance by Respondent Landolphi; (5) mandated attendance by students of the entire school; (6) stood by and supervised the forced attendance of school children for two separate performances of Hot, Sexy

and Safer; and (7) issued payment to Hot, Sexy and Safer Productions, Inc. from government funds held in the school district's treasury. Read in the light most favorable to the non-moving party, these facts clearly indicate that the Hot, Sexy and Safer performance was an entirely authorized policy choice made by Respondents to the deprivation of the constitutional and statutory rights of Petitioners.

(b) The "random and unauthorized act" doctrine, as applied in the instant case, is in direct conflict with the application of the doctrine in this Court and in other Circuits.

The factual and conclusory characterization by the lower courts of Respondent officials' conduct in the instant case is in direct conflict with the holdings of this Court and other circuits. Even a solitary action taken by a person in a position of authority may be deemed the policy of a municipality, giving rise to municipal liability (*Pembaur v. City of Cincinnati*, 475 U.S. 469, 470 (1986)). In *Malak v. Associated Physicians, Inc.*, 784 F.2d 277 (7th Cir. 1986), the court held that:

> Where the official is in a sufficiently high position such that his conduct is that of the governmental entity, then even a single incident can render the entity liable under Section 1983.

Id. at 284. Further, in *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980), *cert. denied*, 449 U.S. 1028, the court stated:

> Action taken by a state official who is cloaked with official power and who purports to be acting under color of official right is state action and is taken under color of state law whether or not the action is in fact in excess of the authority actually delegated to the official under state law.

Id. at 1236.

Significantly, the lower courts in the instant case ignored Petitioners' claims of municipal liability arising from the school committee's failure to supervise their staff and properly insure the protection of the constitutional rights of parents and students (Amended Complaint, paragraph 47). These rights are guaranteed by the First and Fourteenth Amendments to the United States Constitution, and may not be summarily cast aside at the whim of any municipal official.

As this Court acknowledged in *Zinermon*:

> The State delegated to [defendants] the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful [deprivation].

Zinermon, 494 U.S. at 137. Respondents include the highest ranking officials of the school district and, as this Court held, "when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson*." *Id* at 135.

Respondent school officials were the *only* persons who had the authority to protect Petitioners' liberty. They made a deliberate policy decision to disobey their own foundational procedures by failing to provide notice to parents of the Hot, Sexy and Safer performance planned for April 8, 1992, and thereby exhibited complete indifference to the constitutional rights of students and parents. Their actions, arrogant and in violation of the Constitution of the United States as they were, were entirely authorized, and bring Respondents squarely within the parameters of *Zinermon*.

CONCLUSION

Petitioners submit that Petitioners have clearly set forth a violation by Respondents of their Constitutionally protected right to privacy and Petitioner parents' religious freedom and constitutionally protected right to the care, custody and management of their children, which rights the lower courts failed to uphold according to law and precedent.

Petitioners further submit that the failure of Respondents to notify Petitioner parents and obtain their consent to Petitioner students' attendance at the Hot, Sexy and Safer performance violates Petitioners' rights as protected by the United States Constitution and federal and state law, which rights the lower courts also failed to recognize.

Accordingly, we respectfully request that this Court grant the Petition for Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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January 19, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 93-11842-REK

RONALD C. BROWN, *et al*,

Plaintiffs

v.

HOT, SEXY AND SAFER PRODUCTIONS, INC., *et al*,

Defendants

Memorandum And Order
January 19, 1995

Before the court are three motions to dismiss. All defendants join in a motion to dismiss for failure to state a claim (Docket No. 11, filed March 7, 1994), with a supporting memorandum (Docket No. 13). Plaintiffs filed a response to that motion (Docket No. 36, filed June 1, 1994), to which defendants filed a reply (Docket No. 39, filed June 3, 1994).

Defendants Michael Gilchrist and Judith Hass also filed a separate motion to dismiss for failure to state a claim (Docket No. 14, filed March 7, 1994), with a supporting memorandum (Docket No. 15) and affidavits (Docket Nos. 16 and 17). Plaintiffs filed a responsive memorandum (Docket No. 20, filed April 25, 1994), to which defendants filed a reply memorandum (Docket No. 37, filed June 3, 1994).

Defendants Suzanne Landolphi ("Landolphi") and Hot, Sexy and Safer Productions, Inc. ("Hot, Sexy and Safer") filed a motion to dismiss for insufficiency of service and lack of personal jurisdiction (Docket No. 9, filed March 7, 1994), with a supporting memorandum (Docket No. 10). Plaintiffs filed a

response to the motion (Docket No. 22, filed April 25, 1994) accompanied by exhibits (Docket Nos. 23 and 24).

I.

In deciding the present motions to dismiss for failure to state a claim, this court must accept as true all well-pleaded factual assertions in plaintiffs' complaint and draw all reasonable inferences from those assertions in plaintiffs' favor. *Roth v. United States,* 952 F.2d 611, 613 (lst Cir. 1991) (citation omitted).

Before a court grants a motion to dismiss for failure to state a claim, ordinarily it must allow an opportunity to amend the complaint, and clarify the factual allegations to satisfy the requirements of a valid legal cause of action, if that can be done consistently with the pleader's obligations under Rule 11 of the Federal Rules of Civil Procedure. *See Wyatt* v. *City of Boston,* Nos. 9-2330, 93-2367, slip op. at 3-4 (lst Cir., Sept. 15, 1994). Plaintiffs have already amended their complaint once. Nevertheless, even though the motion to dismiss is well-founded on the present record, I will allow it subject to leave to plaintiffs to file promptly a proposed amended complaint clarifying factual allegations so as to state a claim under federal law, to the extent they can do so within the confines of Rule 11.

The facts are stated here as they are alleged in the Amended Complaint.

Defendants played various roles in planning, sponsoring, and producing a live AIDS education program at Chelmsford High School that minor plaintiffs, students at the school, were compelled to attend in violation of various provisions of the United States and Massachusetts Constitutions and federal and state laws.

In March 1992, defendant Judith Hass ("Hass"), then chairperson of the Chelmsford Parent Teacher Organization, entered into negotiations with an agent of defendant Hot, Sexy and Safer

to have defendant Landolphi present live performances of an AIDS education program ("the Program"). Before presentation of the Program, Hass and defendant Michael Gilchrist, M.D. ("Gilchrist"), also a member of the PTO as well as the school physician, viewed a promotional videotape of segments of past performances by Landolphi, as well as promotional brochures and articles. Both Hass and Gilchrist recommended the Program to the school administration.

Hass, as an agent of the defendant Chelmsford School Committee ("School Committee"), a local educational agency, executed a "Performance Agreement" with Hot, Sexy and Safer in March 1992. Hass later signed an authorization on school stationery to allow $1,000 of Chelmsford school funds to be paid to Hot, Sexy and Safer for the Program. Plaintiffs allege that the funds came from two sources: 1) a grant program administered by the School Committee through the Parent Teacher Organization, and 2) from approximately ten private physicians in Chelmsford, including Dr. Gilchrist.

All defendants are alleged to have participated in the decision to engage Landolphi's services. Besides Hass and Gilchrist, they include Wendy Marcks ("Marcks"), a member of the School Committee; Mary E. Frantz ("Frantz"), Chairperson of the School Committee; Richard H. Moser ("Moser"), Superintendent of the Chelmsford Public Schools; Davis S. Troughton ("Troughton"), Assistant Superintendent of the Chelmsford Public Schools: and George J. Betses ("Betses"), Principal of Chelmsford High School.

All defendants except Suzanne Landolphi are sued in their individual and official capacities.

Landolphi presented the Program at two mandatory school assemblies held on April 8, 1992, each lasting 90 minutes. The first presentation was for students in ninth and tenth grades, and the second presentation was for students in eleventh and twelfth grades. Minor plaintiffs Jason Mesiti and Shannon Silva were

students at Chelmsford High School at the time. Each was present at one of the two presentations on April 8. The individual defendants are also alleged to have been present at all or part of one or both presentations of the Program.

The Program, it is alleged, consisted of a sexually explicit monologue by Landolphi and sexually suggestive skits in which she participated with several minors she chose from the audience. During the Program, Landolphi: a) told the students that they were going to have a "group sexual experience, with audience participation"; b) used "four letter words" extensively throughout, as well as lewd and lascivious language for body parts and excretory functions; c) advocated and approved oral sex, masturbation, mutual masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; d) simulated masturbation; e) made references to "erection wear" (loose pants) worn by one minor; f) referred to being in "deep sh _ " after anal sex; g) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; h) had a minor display an "orgasm face" with her for the camera; i) told a minor he was not having enough orgasms; and j) closely inspected and commented about a minor's nice "butt". Minor plaintiffs are not alleged to have been among those who participated in the skits or to have been the direct objects of any of Landolphi's sexual comments.

The minor plaintiffs felt humiliated and intimidated by Landolphi's speech and behavior during her presentation of the Program. In the weeks following the presentations, much coarse jesting, sexual innuendo, and overtly sexual behavior took place among the students at the school.

A school policy adopted by the School Committee and entitled "IGAI" "Sex Education" provides:

> The Committee believes that the public schools can best transmit information on human sexuality to students in the context of the health education continuum. There-

> fore, information and instructional tools appropriate to the age group will be used to include instruction in human sexuality in the curricular offerings on health. Positive subscription, with written parental permission, will be a prerequisite to enrolling.

Plaintiffs allege, however, that no parents were given advance notice of the content of the Program or an opportunity to excuse their children from attendance at the assembly. Plaintiffs further allege that minor plaintiffs were "forced to listen to the lewd and indecent communications, against their will in a coercive environment."

III

Minor plaintiffs, through their parents, and minor plaintiffs' parents, state the following claims for relief under 42 U.S.C. §1983:

I.Deprivation of Privacy Rights in Violation of the First and Fourteenth Amendments

II. Deprivation of Substantive Due Process Rights in Violation of the Fourteenth Amendment

III. Deprivation of Procedural Due Process Rights in Violation of the Fourteenth Amendment

IV. Curtailment of Free Exercise of Religion in Violation of the First Amendment

Plaintiffs also allege violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et. seq.* (Fifth Claim for Relief).

Plaintiffs also allege the following state law claims:

VI. Violation of the Natural Rights Clause of the Massachusetts Constitution, M.G.L. c.12 §11I

VII. Sexual Harassment in Violation of M.G.L. c.151C §1(e)(ii)

VIII. Civil Conspiracy to Violate the United States and Massachusetts Constitutions and Various State Statutes

IX. Violation of State Education Policy, M.G.L. c.71 §30, Requiring school personnel to teach chastity

X. Intentional Infliction of Emotional Distress

As to all of these claims, plaintiffs seek money damages and punitive damages, as well as costs and attorney fees. Also, plaintiffs seek declaratory judgment declaring that defendants' conduct violated M.G.L. c.214 §1C and c.151C §1(e)(ii) (Sexual Harassment), M.G.L. c.71 §30 (Moral Education), c.272 §53 (Lewd and Lascivious Speech and Acts), and c.119 §63 (Delinquency of a Minor), and that defendants deprived plaintiffs of the exercise of their rights under the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C. §1983, and the Massachusetts Constitution, M.G.L. c.12 §11I.

IV

A

The plaintiffs' privacy claim under the First and Fourteenth Amendments is somewhat confused with their substantive due process claim alleging deprivation of liberty interests protected by the Fourteenth Amendment, and their free exercise claim. I will consider here those claims that address interference with family relationships and parental educational prerogatives, as well as any claims that could fairly be described as invoking the right to privacy.

The Supreme Court has recognized a right to privacy that protects against substantial government intrusions into certain personal decisions. See *Roe v. Wade*, 410 U.S. 113, 152 (1973). Only personal rights that are "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of privacy. *Id.* at 152. The right extends to activities relating to marriage, procrea-

tion, contraception, family relationships, and child rearing and education. *Id.* at 152-53 (citations omitted).

Plaintiffs argue that their right of privacy was violated when defendants interfered with their decisions regarding procreation, contraception, and marriage. They allege that the children were exposed, against their will, to offensive expression on these topics.

Exposure to speech about procreation, contraception, and marriage in a high school assembly, even where students' attendance at the assembly is mandatory, does not constitute a violation of the right of privacy. That right "has some extension" to activities relating to those matters, *Id.* at 152, but it does not protect against government action that only incidentally affects one's decision to engage, or not to engage, in those activities.

Plaintiffs also invoke the right to privacy, as well as substantive due process and free religious exercise, in claiming that defendants interfered with plaintiff parents' education of their children, particularly in matters relating to sexuality.

Initially, I note that this allegation first appears in explicit form in plaintiffs' brief, rather than in the Amended Complaint. For the purpose of deciding this motion, however, I will construe the allegation of "interference with the parent/child relationship," which appears in the Amended Complaint, as an allegation of interference with the parents' educational prerogative.

So construed, the allegation fails to state a claim cognizable in law. In the cases relied on by plaintiffs, the state compelled parents through the threat of criminal prosecution to send their children to educational institutions even though their continued attendance threatened to extinguish a distinct way of life based on religion. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The children of plaintiffs in this case, in contrast, were compelled to attend a

one-time assembly and do not allege a threat of continued compulsion to attend future assemblies. Plaintiffs, moreover, do not allege any facts that would qualify them, like the Amish in *Yoder*, as members of a distinct religious group whose religion is integrally tied to a mode of life, the very survival of which is now threatened by their children's forced attendance at a single school assembly.

Even if plaintiffs' allegations brought their case within the compass of *Yoder*, they would not be entitled to damages, but rather would at most be entitled to an injunction against their continued forced attendance. Indeed plaintiffs cite not one case in which a court has awarded damages on the basis of a showing of facts akin to those in *Yoder*. Yet because plaintiffs do not allege that there is any threat that their children will be forced to attend any other presentations of a similar nature in the future, injunctive relief would not be appropriate in this case.

At most, the plaintiffs' allegations amount to a charge that their children were forced to listen to a presentation lasting 90 minutes that in content and form "imping[ed] on their sincerely held religious values regarding chastity and morality." Parents who send their children to public schools, however, daily risk their children's exposure, both inside and outside the classroom, to ideas and values that the parents and the children find offensive. Mere exposure to offensive ideas, absent circumstances such as those in *Yoder*, does not support a parent's claim of violation of rights of substantive due process or free exercise.

> See *Williams v. Board of Education of City of Kanawha*, 388 F. Supp. 93, 96 (S.D.W.Va.), *aff'd* 530 F.2d 972 (4th Cir. 1975) (no violation of parents' rights in inclusion of objectionable and offensive books in curriculum); *Davis v. Page*, 385 F. Supp. 395, 404-405 (D.N.H. 1974) (parents' allegation that health course is "distasteful" does not invoke First Amendment protection against their children's mandatory attendance).

Plaintiffs' reliance on *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (A.D.2 Dept. 1993), is of no avail in this case. There, the court did hold that a program for condom distribution in schools violated parents' substantive due process rights to direct the upbringing of their children. *Id.* at 267. The court specifically noted, however, that "[s]tudents are not just exposed to talk or literature on the subject of sexual behavior; the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases."*Id.* at 266. This case, in contrast, involves only "talk" about sexual behavior. Notably, too, the court held that the condom distribution program did not violate the parents' or children's free exercise rights. *Id.* at 267-68.

Much closer to being on point is a decision of the New York Court of Appeals concerning a claim that a mandatory AIDS curriculum violated the Free Exercise rights of parents who belonged to a religious sect requiring total "separation from evil." *See Ware v. Valley Stream High School District*, 550 N.E.2d 420 (NY 1989). The court did not reach the ultimate question, however, because the record was inadequate to permit summary judgment and the case was remanded for further factfinding. Plaintiffs in this case have not alleged any of the kinds of facts that enabled the plaintiffs to survive summary judgment in that case.

Plaintiffs argue, also, that defendants interfered with the minors' liberty interests in "freedom from sexual misconduct of state officials" and an "emotional safe harbor." The characterization of defendants' conduct as sexual misconduct--if by that term defendants mean mistreatment of minor plaintiffs in a sexual manner--is not in the least supported by the facts alleged in the complaint. The cases cited by plaintiffs are thus entirely inapposite because they concern physical mistreatment or repeated sexual contact between a school official and a student. *See, e.g., Doe v. Taylor Indep. School District*, 15 F.3d 443, 445

(5th Cir. 1994) (school children have a liberty interest in their bodily integrity that is protected by the Due Process Clause, and physical sexual abuse by a school employee violates that right).

Furthermore, plaintiffs fail to cite any precedents that create a right to an "emotional safe harbor." The cases that plaintiffs rely on concern the state's right to regulate speech in order to protect minors from offensive expression. *See, e.g., Bethel School District v. Fraser,* 478 U.S. 675 (1986); *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1988). Those cases, and others cited by plaintiffs, do not create a private cause of action against state officials for exposure to such expression.

Plaintiffs argue, finally, that the children's and the parents' liberty interest in family association was violated by defendants. "State action that affects the parental relationship only incidentally, however, even though the deprivation may be permanent . . . is not sufficient to establish a violation" of an "identified liberty interest" *Pittsley v. Warish,* 927 F.2d 3, 8 (lst Cir.), *cert. den'd,* 112 S. Ct. 226 (1991). The effect on the parent-child relationship in this case cannot, on the basis of the vague generalities stated in the Amended Complaint, be determined to be other than incidental.

I conclude that the allegations of the Amended Complaint are insufficient to state a claim for violation of plaintiffs' right to privacy, or a substantive due process claim based on interference with a protected liberty interest.

B

Plaintiffs also base their substantive due process claim on the line of cases recognizing such a claim where the conduct of state officials "shocks the conscience." *See Rochin v. California,* 342 U.S. 165, 172 (1952). The conduct at issue in *Rochin,* however, was not expressive and did not involve concerns about

freedom of expression that weigh against a determination that the conduct at issue meets the "shock the conscience" standard. Although defendant Ladolphi's presentation was offensive and emotionally upsetting to some observers, discussion of sexual activity for an educational purpose is not the kind of conduct that, under *Rochin*, "shocks the conscience." *See Pittsley*, 927 F.2d at 7 (the fear or trauma of young children resulting from officer's statement to them that they would never see their father again is not sufficient to shock the conscience).

C

Plaintiffs' third claim for relief states that defendants violated their right of procedural due process when they did not provide plaintiff parents an opportunity to elect not to permit their children to attend the Program, in violation of school policy.

Plaintiffs rely on defendant School Committee's "Sex Education Policy" providing that "[p]ositive subscription, with written parental permission, will be a prerequisite to enrolling." Plaintiffs argue that this policy created a liberty interest in advance notification and an exemption option.

Defendants concede, for the purpose of arguing the motion to dismiss, that the quoted policy creates a liberty interest in a state-created entitlement to be free of exposure to communications that are "lewd and indecent," and that plaintiffs were not afforded the process guaranteed by the policy. They argue, however, that plaintiffs still fail to state a claim because the violation of the policy was a random, unauthorized act within the meaning of *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). Plaintiffs counter that the acts of school officials were not unauthorized, under the standard set in *Zinermon v. Burch*, 494 U.S. 113 (1990).

In *Parratt v. Taylor*, the Supreme Court held that a prison inmate who alleged that state officials had destroyed personal

property negligently, without notice and hearing, failed to state a claim for violation of the right to procedural due process, 451 U.S. at 543. The Court concluded that the alleged conduct was a "random and unauthorized act" that "did not occur as a result of some established state procedure" but rather "as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U.S. at 543. The Court noted that the plaintiff had not contended that a predeprivation hearing was not "practicable," or that the procedure itself was inadequate. *Id.* The Court held, moreover, that the state provided an adequate post-deprivation remedy in the form of an action under the state's tort claims procedure. *Id.* at 543-44. In *Hudson v. Palmer,* the Court extended *Parratt* to intentional deprivations of property. 468 U.S. at 536.

The Court extended *Parratt and Hudson* to violations of liberty interests in *Zinermon v. Burch*, a case involving the allegedly wrongful voluntary admission and confinement for treatment of the plaintiff at a state mental hospital. The Court held, however, that because the state procedure had broadly delegated an uncircumscribed power to state officials to effect the deprivation at issue, and use of the predeprivation procedures applicable to involuntary commitments was practicable in the circumstances, the plaintiff had stated a claim for violation of his right to procedural due process. 494 U.S. at 135-39. "The critical element of the *Zinermon* Court's analysis [was] the Court's sense that predeprivation safeguards might have had some value in guarding against the injury allegedly suffered by Burch." *Lowe v. Scott,* 959 F.2d 323, 344 (lst Cir. 1992).

In *Lowe,* a doctor sued an officer of a medical licensing board for representing wrongly to the hospital in which the doctor worked that the doctor was forbidden under a consent decree from engaging in certain duties; the representation allegedly deprived the doctor of his property interest in performing those duties when the hospital forbade him from continuing to

perform them. The court held that plaintiff was not entitled to a jury instruction on this claim because the officer's behavior was random and unauthorized. The misrepresentation "deliberately circumvented procedures already established under the consent order" for a dispute resolution mechanism that was "as detailed a predeprivation safeguard as could have been provided." *Id.* at 343, 344. Defendant's conduct was "precisely the kind of unauthorized and unforeseeable official conduct that is impossible for the state to prevent or deter through the imposition of predeprivation procedures." *Id.* at 343.

This case, too, is governed by the *Parratt-Hudson* random unauthorized act doctrine. The Amended Complaint does not allege that the policy itself is inadequate, but rather that defendants failed to follow it. Plaintiffs state in their brief that they in fact do challenge the policy as insufficient on the grounds that it is "vague" and "overly broad." Their argument to this effect, however, is undeveloped and is stated entirely in conclusions. Moreover, it contradicts another statement in plaintiffs' brief that the "Chelmsford School Committee was prepared by its own policy to afford procedural due process," a statement that suggests the policy was sufficiently definite to apply to this case. Indeed, the policy's requirement of "positive subscription" through "written parental permission" is definite enough to support a conclusion that defendants in this case, by failing to provide advance notice to parents of the Program, contravened the policy. (In fact, because the alleged violation here was *not* pursuant to established procedure, the exception to *Parratt* recognized in *Logan v. Zimmerman*, 455 U.S. 422 (1982) and cited by plaintiffs is irrelevant.)

Complainants have not alleged facts from which a court could reasonably infer that any defendant was vested with "the power and authority to effect the very deprivation complained of here," see *Zinermon*, 494 U.S. at 138. The Sex Education policy itself certainly vests no discretion in school officials. It

states that "[p]ositive subscription, with written parental permission, *will be* a prerequisite to enrolling." (emphasis added). Plaintiffs have suggested no source of authority by which any defendant was authorized to circumvent the policy in this instance or any other. Although three defendants are, or were, members of the committee that enacted the positive subscription policy, there is no allegation that any one of them, or all three acting together, were authorized to circumvent a policy adopted and enacted by the committee as a whole.

Plaintiffs fail to allege any factual basis for an inference that the school officials' contravention of this policy was predictable or foreseeable. Plaintiffs allege their conclusion that the acts complained of were not random, unauthorized events because the Program was a planned, premeditated event. It is, however, not the Program itself that is alleged to constitute a violation of their due process rights, but rather the failure to give notice of and an opportunity to opt out of the Program. That omission, I conclude, was a "random, unauthorized event" within the meaning of that phrase as used in *Parratt* and *Hudson*.

The Amended Complaint, finally, does not allege any factual or legal basis for a determination that post-deprivation remedies under state law are insufficient. In their written argument, plaintiffs rely on Zinermon in contending that they need not argue the adequacy of state remedies. I have concluded, however, that *Zinermon* does not control this case. Because plaintiffs did not argue in the alternative that the available state remedies--one of which was identified in movant's brief--would be inadequate in this case, they have failed to allege a basis for determining that such remedies would in fact be inadequate. In particular, as defendants have pointed out, state remedies include mandamus and tort damages.

For all of these reasons, I conclude that plaintiffs have failed to state a cognizable procedural due process claim.

D

Plaintiffs' fourth claim for relief is that defendants' endorsement and encouragement of sexual promiscuity at a mandatory assembly violated the Free Exercise Clause of the First Amendment by "impinging on their sincerely held religious values regarding chastity and morality."

To the extent that this is a claim about the plaintiff *parents'* rights to govern the instruction of their children, I have already addressed that claim in a previous section, in which I concluded that the allegations do not state a claim on which relief can be granted in this court. The cases relied on by plaintiffs in the arguments made in that section, namely *Yoder*, *Pierce* and their progeny, expressly do *not* address the free exercise rights of minors. *See Yoder*, 406 U.S. at 205.

In this section I limit consideration to the alleged violation of the minor plaintiffs' free exercise rights.

The parties dispute whether this case is governed by the law announced in *Employment Division v. Smith*, 494 U.S. 872 (1990), or by the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb - 2000bb-4. The Amended Complaint cites only 42 U.S.C. § 1983 and makes no mention of the Religious Freedom Restoration Act. Nevertheless, I conclude that plaintiffs have failed to state a claim under either that Act or under the cases interpreting the Free Exercise Clause.

Under the Religious Freedom Restoration Act, only government conduct that "*substantially* burdens a person's exercise of religion" invokes the Act's dual requirement of a compelling interest and least restrictive means. 42 U.S.C. § 2000bb-l(b) (emphasis added) I assume, in considering the motion to dismiss, that Congress intended by this language to restore the law to its condition pre-*Smith*.

The Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs

as such." *McDaniel v. Paty,* 435 U.S. 618, 626 (1978). Even where it does not directly penalize or reward religious beliefs, government substantially burdens religious exercise where it conditions receipt of an important benefit on conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief. *Thomas v. Review Board of the Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). "This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Lyng v. Northwest Indian Cemetery Protection Association,* 485 U.S. 439, 450-51 (1988).

Government actions that only offend religious believers, and cast doubt upon the veracity of their religious beliefs, do not burden religion unless they penalize faith.

> *Wilson v. Block,* 708 F.2d 735, 741 (D.C. Cir.), *cert. den'd,* 464 U.S. 956 (1983) and *cert. den'd sub nom Hoci Indian Tribe v. Block,* 464 U.S. 1056 (1984) (holding no impermissible burden on tribes' religious exercise occurred where government approved development of mountains even though that development would seriously impair ability to pray and conduct ceremonies on the mountains and gather sacred objects from the mountains).

Some courts have applied this principle to students' forced exposure to ideas repugnant to their religion.

> See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063-68 (6th Cir. 1987), *cert. den'd,* 484 U.S. 1066 (1988) (holding that requirement that students read assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious

belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on students' free exercise of religion); *Grove v. Mead School Dist. No. 354,* 753 F.2d 1528, 1543 (9th Cir.), *cert. denied,* 474 U.S. 826 (1985) (Canby, J., concurring) (suggesting that "mere offense" from exposure to an objectionable book would not require student's excusal from exposure to such book, whereas parents' beliefs that "eternal religious consequences" would result from such exposure might require excusal under *Yoder*); but see *Spence v. Bailey,* 465 F.2d 797 (6th Cir. 1972) (unconstitutional denial of exemption of high school student found to be a conscientious objector on religious grounds from ROTC class).

In the cases relied on by plaintiffs in which courts addressed free exercise challenges to sex education curricula, the courts determined that no substantial burden existed because the policies did not mandate attendance.

> *See, e.g., Madeiros v. Kioysaki*, 478 P.2d 314 (Ha. 1970); *Smith v. Ricci*, 446 A.2d 501 (N.J.), *appeal dismissed sub nom Smith v. Brandt,* 459 U.S. 962 (1982).

These cases simply did not decide whether a substantial burden would have been placed on the free exercise of religion if the school had failed to allow students to be excused.

Although I do not decide whether plaintiffs' forced participation, if such had occurred, in any part of the Program, would have violated their free exercise rights, their mere unwilling observation of the Program did not constitute the sort of coercion that violates the First Amendment. This case would be different, perhaps, if plaintiffs were threatened with compulsory attendance at future assemblies in which sexual activity was graphically described. No such threat is

alleged here. Rather, plaintiffs seek damages for their forced exposure, on a one-time and short-lived basis, to ideas that are repugnant to their religious beliefs. I conclude that such exposure does not constitute a burden on their free exercise of religion sufficiently substantial to create a cause of action for damages under the Religious Freedom Restoration Act.

Plaintiffs have an even more difficult case under *Smith*, which rejected the traditional test--later revived by the Act--requiring that government action that substantially burdens free religious exercise be justified by a compelling interest. Instead, neutral, generally applicable laws that proscribe conduct that a person's religion prescribes (or prescribe conduct that a person's religion proscribes) do not violate the free exercise clause. *Smith*, 494 U.S. at 879. Plaintiffs do not allege in the Amended Complaint, nor contend in their brief, that the requirement of attendance at the Program was anything but a neutral requirement that applied generally to all students.

Rather, plaintiffs seek to bring this case within the "hybrid exception" recognized in *Smith* for cases in which the government violates the free exercise right and some other constitutional right. See *id.* at 881. Plaintiffs aver, in particular, that the right coupled with the free exercise of religion in this case is the right of "family privacy/association." I have already concluded, however, that plaintiffs' allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. I conclude also that this case does not come within the hybrid exception recognized in *Smith*. Accordingly, defendants' conduct is not actionable under *Smith*.

In summary, I conclude that plaintiffs fail to state a cause of action under *Smith* or under the Religious Freedom Restoration Act.

In their Fifth Claim for Relief, plaintiffs claim intentional discrimination, on the basis of sex, by defendants' creation of a

sexually hostile and offensive educational environment, in violation of Title IX. According to plaintiffs,

> Following the presentation of the Program, many students at Chelmsford High School displayed an identical disrespect to the privacy and dignity of other students as did Landolphi, by copying her words and "routines". Much coarse jesting, sexual innuendo, and overtly sexual behavior took place for weeks following the Program, both in and out of CHS, creating a hostile sexual environment for the plaintiffs as well as the other students and staff at the school.

Amended Complaint, ¶ 34.

I conclude that the Amended Complaint is insufficient to state a claim under Title IX because plaintiffs do not allege discrimination on the basis of gender.

Title IX reads in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity . . . .

20 U.S.C. §1681(a). Sexual harassment by a teacher of a student is actionable under Title IX. *Franklin v. Gwinnett Counts Public Schools*, 112 S. Ct. 1028, 1038 (1992). No court has addressed the nature of a hostile environment suit by students under Title IX, although Title IX does extend to hostile environment harassment of workers in an educational institution by supervisors or co-workers, *see Lipsett v. University of Puerto Rico,* 864 F.2d 881 (lst Cir. 1988).

Plaintiffs contend, without any support in the case law, that a hostile sexual environment can be created against both genders simultaneously. By the plain language of the statute, however, it is clear that a plaintiff, in alleging sexual harassment under Title IX, must allege that the harassment occurred "on the

basis of sex" in order to survive a motion to dismiss. In other words, plaintiffs in this case must allege that they were harassed *because of* their gender. *See Franklin*, 112 S. Ct. at 1037 (quoting the holding in *Meritor Savings Bank. FSB* v. *Vinson*, 477 U.S. 57 (1986), a case decided under Title VII, that "'when a supervisor sexually harasses a subordinate because of that subordinate's sex, that supervisor 'discriminates' on the basis of sex.'").

Plaintiffs do not allege that any harassment that occurred against minor plaintiffs, whether by Landolphi during the Program, or by others as a result of the Program, was directed against minor plaintiffs *because of* their gender. Therefore, I conclude that the Amended Complaint does not state a claim of discrimination on the basis of sex under Title IX.

V

Because plaintiffs have failed to state a federal claim on the merits, I need not consider the arguments that certain defendants were not state actors and that certain defendants were subject to qualified immunity.

VI

Defendants request that all state law claims be dismissed by the court acting in its discretion to dismiss pendent state law claims under 28 U.S.C. §1367(c)(1) and (3).

Section 1367(c)(3) gives a court discretion to decline to exercise supplemental jurisdiction over a state law claim where the court has dismissed all claims over which it has original jurisdiction. I have determined that, subject to leave to amend, I should dismiss all claims over which this court has original jurisdiction. It is therefore appropriate, I conclude, to dismiss the state law claims.

Dismissal of state law claims is particularly justified in this case because they raise novel issues of state law. *See* 28 U.S.C. § 1367(c)(1).

INTERLOCUTORY ORDER

For the foregoing reasons, it is hereby ORDERED:

Defendant's Joint Motion to Dismiss for Failure to State a Claim (Docket No. 11) is allowed.

Motion to Dismiss of Defendants Gilchrist and Hass (Docket No. 14) is Dismissed as Moot.

Motion to Dismiss of Defendants Landolphi and Hot, Sexy and Safer (Docket No. 9) is Dismissed as Moot.

The court will defer ordering entry of Final Judgment of dismissal in order to allow plaintiffs an opportunity to file an amended complaint attempting to cure deficiencies in the present pleading. If no amendment is filed on or before February 10, 1995, the clerk will then enter Final Judgment of dismissal forthwith.

/s/

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 93-11842-REK

RONALD C . BROWN, ET AL.

Plaintiff

v.

HOT, SEXY AND SAFER PRODUCTIONS, INC.,
et al.

Defendant

FINAL JUDGEMENT
March 3, 1995

KEETON, D.J.

In accordance with the Court's Memorandum and Order of January 19, 1995, IT IS HEREBY ORDERED:

This action IS DISMISSED.

By the Court;
ROBERT J. SMITH, JR.,
Clerk

By: _____
Joanne M. Cull
Deputy Clerk

United States Court of Appeals
For The First Circuit

No. 95-1275

RONALD C. BROWN, ET AL.,

Plaintiffs - Appellants,

v.

HOT, SEXY AND SAFER PRODUCTIONS, INC., ET AL.,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before
Torruella, *Chief Judge,*
Stahl, *Circuit Judge,*
and Dominguez, *District Judge.*

John L. Roberts for appellant.

John Foskett, with whom Deutsch Williams Brooks DeRensis Holland & Drachman, P.C., Paul F. Degnan, Nancy Kirk, Kirby & Associates, Mary L. Bonauto, Bennett H. Klein, Gay & Lesbian Advocates & Defenders, Neila J. Straub and Straub & Meyers were on joint brief for appellees Chelmsford School Committee, Wendy Marcks, Mary E. Frantz, Richard H. Moser, David S. Troughton, George J. Betses, Suzanne Landolphi and Hot, Sexy & Safer Productions, Inc.; Frances S. Cohen, with whom Monica L. Phillips, Hill & Barlow, Susan Wunsch and Massachusetts Civil Liberties Union Foundation were on brief for appellees Michael Gilchrist and Judith Hass.

October 23, 1995

* Of the District of Puerto Rico, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1275

RONALD C. BROWN, ET AL.,
Plaintiffs - Appellants

v.

HOT, SEXY AND SAFER PRODUCTIONS, INC., ET AL.,
Defendants - Appellees

JUDGMENT

Entered: October 23, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
/s/ Francis P. Scigliano
Clerk

TORRUELLA, *Chief Judge*. The plaintiffs are two minors and their parents. The minors allege that they were compelled to attend an indecent AIDS and sex education program conducted at their public high school by defendant Hot, Sexy and Safer Productions ("Hot, Sexy, and Safer"). Plaintiffs allege, *inter alia*, that the compelled attendance deprived the minors of their privacy rights and their right to an educational environment free from sexual harassment. The district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). We affirm.

BACKGROUND

The plaintiffs are Chelmsford High School students Jason P. Mesiti ("Mesiti") and Shannon Silva ("Silva"), and their parents Ronald and Suzanne Brown ("the Browns"), and Carol and Richard Dubreuil ("the Dubreuils"). The plaintiffs' complaint alleges the following facts, which we take as true for purposes of this appeal. On April 8, 1992, Mesiti and Silva attended a mandatory, school-wide "assembly" at Chelmsford High School. Both students were fifteen years old at the time. The assembly consisted of a ninety-minute presentation characterized by the defendants as an AIDS awareness program (the "Program"). The Program was staged by defendant Suzi Landolphi ("Landolphi"), contracting through defendant Hot, Sexy, and Safer, Inc., a corporation wholly owned by Landolphi.

Plaintiffs allege that Landolphi gave sexually explicit monologues and participated in sexually suggestive skits withseveral minors chosen from the audience. Specifically, the complaint alleges that Landolphi: 1) told the students that they were going to have a "group sexual experience, with audience participation"; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during

promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as "erection wear"; 6) referred to being in "deep sh--" after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his "orgasm face" with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a "nice butt"; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.

Plaintiffs maintain that the sexually explicit nature of Landolphi's speech and behavior humiliated and intimidated Mesiti and Silva. Moreover, many students copied Landolphi's routines and generally displayed overtly sexual behavior in the weeks following the Program, allegedly exacerbating the minors' harassment. The complaint does not allege that either of the minor plaintiffs actually participated in any of the skits, or were the direct objects of any of Landolphi's comments.

The complaint names eight co-defendants along with Hot, Sexy, and Safer, and Landolphi, alleging that each played some role in planning, sponsoring, producing, and compelling the minor plaintiffs' attendance at the Program. In March 1992, defendant Judith Hass ("Hass"), then chairperson of the Chelmsford Parent Teacher Organization (the "PTO"), initiated negotiations with Hot, Sexy, and Safer. Hass and defendant Michael Gilchrist, M.D., also a member of the PTO, as well as the school physician, viewed a promotional videotape of segments of Landolphi's past performances and then recommended the Program to the school administration. On behalf of defendant Chelmsford School Committee (the "School Committee"), Hass executed an agreement with Hot, Sexy, and Safer, and authorized the release of $1,000 of Chelmsford school funds to pay Landolphi's fee.

The complaint also names as defendants two other members of the School Committee, Wendy Marcks and Mary E. Frantz, as well as the Superintendent and Assistant Superintendent of the Chelmsford Public Schools, Richard H. Moser, and David S. Troughton, and the Principal of Chelmsford High School, George J. Betses. Plaintiffs allege that all the defendants participated in the decisions to hire Landolphi, and to compel the students to attend the Program. All the defendants were physically present during the Program.

A school policy adopted by the School Committee required "[p]ositive subscription, with written parental permission" as a prerequisite to "instruction in human sexuality." The plaintiffs allege, however, that the parents were not given advance notice of the content of the Program or an opportunity to excuse their children from attendance at the assembly. The district court granted defendants' motion to dismiss plaintiffs' complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted, and also dismissed the state law claims under the supplemental jurisdiction principles of 28 U.S.C. § 1367.[1] The district court deferred entry of final judgment, giving plaintiffs leave to file an amended complaint curative of the deficiencies by February 10, 1995. Plaintiffs failed to do so, and final judgment was entered on March 3, 1995, dismissing their claims.

STANDARD OF REVIEW

We exercise *de novo* review over a district court's dismissal of a claim under Rule 12(b)(6). *Vartanian v. Monsanto Co.,* 14 F.3d 697, 700 (lst Cir. 1994); *Kale v. Combined Ins. Co. of America,* 924 F.2d 1161, 1165 (lst Cir. 1991). We accept the

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[1] 28 U.S.C. § 1367(c) gives a court discretion to "decline to exercise supplemental jurisdiction over a [state law] claim [where] the district court has dismissed all claims over which it has original jurisdiction."

allegations of the complaint as true, and determine whether, under any theory, the allegations are sufficient to state a cause of action in accordance with the law. *Vartanian,* 14 F.3d at 700; *Knight v. Mills,* 836 F.2d 659 (lst Cir. 1987). Although, our review is plenary, an appeal is not an opportunity to conjure new arguments not raised before the district court. *McCoy v. Massachusetts Inst. of Tech.,* 950 F.2d 13, 22 (lst Cir. 1991), *cert. denied,* 112 S. Ct. 1939 (1992). In addition, "[b]ecause only well pleaded facts are taken as true, we will not accept a complainant's unsupported conclusions or interpretations of law." *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971 (lst Cir. 1993)(citations omitted). We may affirm a district court's dismissal order under any independently sufficient grounds. *Id.*

DISCUSSION

The plaintiffs seek both declaratory and monetary relief, alleging that the school sponsored program deprived the minor plaintiffs of: (1) their privacy rights under the First and Fourteenth Amendments; (2) their substantive due process rights under the First and Fourteenth Amendments; (3) their procedural due process rights under the Fourteenth Amendment; and (4) their First Amendment rights under the Free Exercise Clause (in conjunction with a deprivation of the parent plaintiffs' right to direct and control the upbringing of their children). Plaintiffs also allege that the Program created a sexually hostile educational environment in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.[2]

As an initial matter, we briefly address defendants assertion of the defense of qualified immunity. Plaintiffs seek monetary

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[2] The complaint also alleges five state law claims which are irrelevant for purposes of this appeal.

damages under 42 U.S.C. § 1983,[3] and defendants assert the affirmative defense of qualified immunity, which shields public officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is "clearly established" if, at the time of the alleged violation, "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "[T]he relevant question is whether a reasonable official could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct." *Singer v. Maine*, 49 F.3d 837, 844 (lst Cir. 1995) (citations omitted).

The Supreme Court has explained that: "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all" *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Therefore, "before even reaching qualified immunity, a court of appeals must ascertain whether the appellants have asserted a violation of a constitutional right at all." *Watterson v. Pave*, 987 F.2d 1, 7 (lst Cir. 1993); *Singer*, 49 F.3d at 844. Thus, as a predicate to the objective reasonableness inquiry, a plaintiff must establish that a particular defendant violated the plaintiff's federally protected rights." *Singer*, 49 F.3d at 844 (citations omitted).

Accordingly, we first address each of the plaintiffs' claims to determine whether it states a cause of action under federal

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[3] Section 1983 provides a remedy against any person who, under color of state law, deprives a citizen of his or her constitutional rights. 42 U.S.C. § 1983.

law. If any of the claims meet this threshold requirement, we will then proceed to the issue of qualified immunity.

I. Privacy Rights and Substantive Due Process

The Fourteenth Amendment provides that "[n]o State shall . . .deprive any person of life liberty or property without due process of law." U.S. Const. amend XIV. The substantive component of due process protects against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). *See also Pittsley v. Warish*, 927 F.2d 3, 6 (lst Cir. 1991) (comparing substantive due process to procedural due process) (citing *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961)). There are two theories under which a plaintiff may bring a substantive due process claim. Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. *Pittsley*, 927 F.2d at 6 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state's conduct "shocks the conscience." *Id.* at 6 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). Plaintiffs contend that compelling the minors' attendance at the Program constitutes a substantive due process violation under both tests.

A. Conscience Shocking Behavior

Plaintiffs' claim that the defendants engaged in conscience shocking behavior when they compelled the minor plaintiffs to attend the Program. The Supreme Court set the standard for analyzing claims of conscience shocking behavior in *Rochin*. In that case, the Court held that the government could not use evidence obtained by pumping a defendant's stomach against his will because the state actor's conduct was so egregious that it "shock[ed] the conscience" and offended even "hardened sensibilities." *Rochin*, 342 U.S. at 172. The Court explained that

the stomach pumping employed by the state was "too close to the rack and screw to permit of constitutional differentiation." *Id.*

Similarly, we have found "conscience shocking" conduct only where the state actors engaged in "extreme or intrusive physical conduct." *Souza v. Pina,* 53 F.3d 423, 427 (lst Cir. 1995); *Harrington v. Almy,* 977 F.2d 37, 43-44 (lst Cir. 1992) (reasonable fact-finder could find "conscience shocking" conduct where a police officer charged with child abuse was required to take a penile plethysmography [4] as a condition of his reinstatement). See also *Garcia v. Miera,* 817 F.2d 650, 655 (l0th Cir. 1987) (corporal punishment of students may "shock the conscience" if it "caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power") (quoting *Hall v. Tawney,* 621 F.2d 607, 613 (4th Cir. 1980)).

Although we have not foreclosed the possibility that words or verbal harassment may constitute 'conscious shocking' behavior in violation of substantive due process rights, see *Souza,* 53 F.3d at 427; *Pittsley,* 927 F.2d at 6, our review of the caselaw indicates that the threshold for alleging such claims is high and that the facts alleged here do not rise to that level.

In *Souza,* the plaintiff alleged that the prosecutor had caused the suicide of her son by conducting press conferences in which he encouraged the media to link the son to a string of serial murders. The plaintiff further alleged that the prosecutor knew of her son's suicidal tendencies and should have known that he would take his own life as a result of the accusations. Although we "pause[d] to make clear that we do not condone the conduct alleged by *Souza,*

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[4] A penile plethysmograph assesses a person's sexual profile by the placement of a gauge on the subjects' penis while he views various sexually explicit slides of both adults and children.

we nevertheless found that the conduct was not "conscience shocking." *Souza*, 53 F.3d at 424-27.

In *Pittsley*, police officers told two young children -ages four and ten -- that "if we ever see your father on the street again, you'll never see him again." *Pittsley*, 927 F.2d at 5. When the police subsequently arrested the children's father, they "use[d] vulgar language" and refused to let the children give their father a hug and kiss goodbye. *Id.* In affirming the directed verdicts for defendants, we explained: "As despicable and wrongful as it may have been, the single threat made by the officers is not sufficient to 'shock the conscience.'" *Id.* at 7.

The facts alleged at bar are less severe than those found insufficient in *Souza* and *Pittsley*. The minor teenagers in this case were compelled to attend a sexually explicit AIDS awareness assembly without prior parent approval. While the defendants' failure to provide opt-out procedures may have displayed a certain callousness towards the sensibilities of the minors, their acts do not approach the mean-spirited brutality evinced by the defendants in *Souza* and *Pittslev*. We accordingly hold that the acts alleged here, taken as true, do not constitute conscience shocking and thus fail to state a claim under *Rochin*.

B. Protected Liberty Interests

The Supreme Court has held that the Fourteenth Amendment encompasses a privacy right that protects against significant government intrusions into certain personal decisions. See *Roe v. Wade*, 410 U.S. 113, 152 (1973). This right of privacy "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* (citations omitted). Nevertheless, the Supreme Court has explained that only those rights that "can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Regulations limiting these "fundamental rights" may be justified "only by a

'compelling state interest . . . [and] must be narrowly drawn to express only the legitimate interests at stake." Id. (citations omitted).

1. Right to Rear Children

Parent-plaintiffs allege that the defendants violated their privacy right to direct the upbringing of their children and educate them in accord with their own views. This, they maintain, is a constitutionally protected "fundamental right" and thus can only be infringed upon a showing of a "compelling state interest" that cannot be achieved by any less restrictive means.

The genesis of the right claimed here can be found in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). In *Meyer*, the Court struck down a state law forbidding instruction in certain foreign languages in part because it arbitrarily interfered with the "right of parents" to procure such instruction for their children. *Meyer*, 262 U.S. at 400. In so holding, the Court stated:

> While this Court has not attempted to define with exactness the liberty [guaranteed by the due process clause of the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

Two years later the Court in *Pierce* struck down a state statute requiring public school attendance -- and thus precluding attendance at parochial schools -- because it "unreasonably interfere[d] with the liberty of parents or guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. The *Meyer* and *Pierce* decisions have since been interpreted by the Court as recognizing that, under our Constitutional scheme, "the custody, care and nurture of the child reside first in the parents." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); see *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972).

Nevertheless, the *Meyer* and *Pierce* cases were decided well before the current "right to privacy" jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny. We need not decide here whether the right to rear one's children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right.[5]

The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific

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[5] The issue is muddled because the *Meyer* and *Pierce* cases were decided on the grounds that the "statute as applied is arbitrary and without reasonable relation to any end within the competency of the state." *Meyer,* 262 U.S. at 403; Pierce, 268 U.S. at 534-36. Indeed, the opinions indicate that something less than the current "compelling state interest" test was then used to evaluate a substantive due process challenge involving one of the listed liberty interests: "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer,* 262 U.S. at 399-400; see also *Pierce,* 268 U.S. at 535.

Moreover, it should be noted that these cases were decided in the 1920's, before the Bill of Rights was incorporated into the Fourteenth Amendment, and would probably be decided today on First Amendment grounds. Rotunda

educational program -- whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. *Meyer*, 262 U.S. at 402, discussed in, Tribe, *supra*, § 15-6 at 1319. We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. See Rotunda & Nowak, *supra*, § 18.28 n.25. We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools .[6]

2. Right to be Free from Offensive Speech

& Nowak, *Treatise on Constitutional Law- Substance and Procedure*, § 21.7 (2d ed. 1992); Laurence H. Tribe, *American Constitutional Law*, § 15-6 at 1319-20 (1988) (suggesting that they reflect the First Amendment's limit on the state's ability to contract the spectrum of available knowledge") (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

[6] Plaintiffs claim that *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (A.D.2 Dept. 1993), supports their position that they have a fundamental right to preclude the schools from teaching subjects that they find objectionable. The

The minor plaintiffs maintain that the defendants' conduct violated their privacy right to be free from "exposure to vulgar and offensive language and obnoxiously debasing portrayals of human sexuality.'" Plaintiffs cite no cases -- and we have found none -- indicating that such a fundamental privacy right exists. Rather, they attempt to extract the claimed privacy right from the Supreme Court's First Amendment cases which uphold the state's limited power to regulate or discipline speech to protect minors from offensive or vulgar speech. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)(cited for the proposition that "[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students"); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). We agree with the district court that these cases "do not create a private cause of action against patently offensive language."[7]

II. Procedural Due Process

The plaintiffs' third claim alleges that their procedural due process rights under the Fourteenth Amendment were violated

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court in *Alfonso* did hold that the parental right to direct the upbringing of their children was fundamental and that it was violated by a program providing for condom distribution at a public high school. However, the court's holding specifically distinguished the condom distribution program from exposure "to talk or literature on the subject of sexual behavior," finding that the latter claim would "falter in the face of the public school's role in preparing students for participation in a world replete with complex and controversial issues." *Id.* at 266.

[7] The Supreme Court has explained that a special situation pertains where a free exercise challenge is brought in conjunction with a substantive due process challenge involving the right of parents to direct the upbringing of their children. *See Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). We therefore analyze this "hybrid right" along with their free exercise challenge. *See infra.*

when the defendants compelled the minor plaintiffs to attend the Program without giving the parents advance notice and an opportunity to opt out of attending.

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Parratt v. Taylor*, 451 U.S. 527, 537 (1981)). Application of this prohibition requires a well settled two-stage analysis. We first decide whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property." If protected interests are implicated, we then must decide what procedures constitute "due process of law." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (citations omitted). Protected liberty interests may arise from two sources -- the Due Process Clause itself and the laws of the states. *Kentucky Dept. Of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted).

The liberty preserved from deprivation without due process includes the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. As previously discussed, however, the liberty protected by the Fourteenth Amendment does not encompass a right to be free from exposure to speech which one regards as offensive. Thus, the plaintiffs' asserted liberty interest, if one exists, must derive from state law.

The plaintiffs contend that state law and the School Committee's policy on "Sex Education" (the "Sex Education Policy") confers a protected liberty interest, and that the defendants' actions deprived them of it without due process. Specifically, the complaint alleges that the defendants failed to follow the school's Sex Education Policy, which provides:

> The Committee believes that the public schools can best transmit information on human sexuality to students in the context of the health education continuum. Therefore, information and instructional tools appropriate to the age group will be used to include instruction in human sexuality in the curricular offerings on health. Positive subscription, with written parental permission, will be a prerequisite to enrolling.

(Emphasis added.) The complaint further alleges that the parents were not given advance notice of the contents of the Program or an opportunity to opt out.

Defendants concede for the purposes of their motion that the Sex Education Policy confers a liberty interest in freedom from exposure to the content of the Program and in being afforded an opportunity to opt out.[8] They argue, however, that the plaintiffs still fail to state a claim because the violation of the Sex Education Policy was a "random and unauthorized" act within the confines of the *Parratt-Hudson* doctrine. *Hudson v. Palmer*, 468 U.S. 517 (1984); Parratt, 451 U.S. 527. The plaintiffs maintain that their claim is more akin to that stated in *Zinermon*, and is thus outside the scope of the *Parratt-Hudson* doctrine.

In *Parratt*, a state prisoner brought a § 1983 action because prison employees had negligently lost materials he had ordered by mail. The Supreme Court ruled that the prisoner's postdeprivation tort remedy was all the process that was due because the

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[8] The plaintiffs also maintain that Mass. Ann. Laws ch. 71, § 1 (1995) confers a protected liberty interest. That statute grants a right to opt out from "instruction on disease" to students whose "sincerely held religious beliefs" conflict with such instruction. Defendants assume for the purposes of this appeal that Mass. Gen. L. ch. 71, § 1 is an alternative source for the claimed liberty interest.

state could not have provided any predeprivation procedural safeguard to address the risk of this kind of random and unauthorized deprivation. *Parratt*, 451 U.S. at 541. As the Court explained, "the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.* In *Hudson*, the Supreme Court extended this reasoning to intentional deprivations of property, explaining that "[the state can no more anticipate the random and unauthorized intentional conduct of its employees than it can similar negligent conduct." *Hudson*, 468 U.S. at 533.

Parratt and *Hudson* preclude § 1983 claims for the "random and unauthorized" conduct of state officials because the state cannot "anticipate and control [such conduct] in advance." *Zinermon*, 494 U.S. at 130. In addition, the Court has made clear that unauthorized deprivations of property by state employees do not constitute due process violations under the Fourteenth Amendment so long as meaningful postdeprivation remedies are available. *Id.* at 128-30. Moreover, the Court has emphasized that "no matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing predeprivation process." *Id.* at 129 (citations omitted). Therefore, "the proper inquiry under *Parratt* is whether the *state* is in a position to provide for predeprivation process." *Id.* at 130 (quotation omitted).

Zinermon involved a due process claim against the state doctors who admitted the plaintiff Burch as a "voluntary" mental patient. Burch alleged that he was incompetent at the time of his admission and should have been afforded the protections provided by the involuntary placement procedure. Although the Court found that *Parratt-Hudson* doctrine applied to depriva-

tions of liberty, it nevertheless concluded that Burch had failed to state a viable § 1983 claim. *Id.* at 131-32.

The court found that Burch's claim was not controlled by *Parratt* and *Hudson* for three basic reasons. First, the Court explained that the timing of Burch's deprivation of liberty was more predictable than in *Parratt* and *Hudson*. As the Court explained, "it is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent." *Id.* at 136. Thus, "[a]ny erroneous deprivation will occur, if at all, at a specific, predicable point in the admission process." *Id.* Second, the Court found that the state could have provided meaningful predeprivation process and possibly averted the deprivation Burch alleged. Third, the Court found that because the state had delegated the hospital officials broad authority to "effect the very deprivation complained of here," their conduct could not be characterized as "unauthorized" in the same sense as the destruction of the prisoners' property in *Parratt* and *Hudson*.

The *Parratt-Hudson-Zinermon* trilogy "requires that courts scrutinize carefully the assertion by state officials that their conduct is 'random and unauthorized' . . . where such a conclusion limits the procedural due process inquiry under § 1983 to the question of the adequacy of state postdeprivation remedies." *Lowe v. Scott*, 959 F.2d 323, 341 (lst Cir. 1992).[9] Our examination here leads us to agree with the district court that the plaintiffs' claim falls within the *Parratt-Hudson* doctrine.

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[9] Other circuits have interpreted the doctrine similarly. *See Caine v. Hardy*, 943 F.2d 1406, 1413 (5th Cir. 1991) (en banc) ("*Zinermon* thus requires a hard look at a Parratt/Hudson defense to determine whether the state officials' conduct, under all the circumstances, could have been adequately foreseen and addressed by procedural safeguards."); *Easter House v. Felder*, 910 F.2d 1387, 1402 (7th Cir.1990) (en banc), *cert. denied*, 111 S. Ct. 783 (1991) (concluding that "Zinermon holds only that predictable deprivations of liberty and property which flow from authorized conduct are compensable under § 1983").

The plaintiffs have not alleged any facts that would bring their claim within the scope of *Zinermon*. They point to no facts suggesting that the state could have predicted the defendants' failure to give the required notice and opt-out opportunity, nor do they suggest any reasonable additional predeprivation procedures which would have meaningfully reduced the risk of the due process violation alleged.

The plaintiffs contend that the deprivation cannot be characterized as "random and unauthorized" because the performance was planned well in advance. This contention ignores both the nature of the deprivation and the relevant caselaw. The deprivation alleged here is not the staging of the Program itself, but rather the defendants' failure to follow the procedures mandated by the Sex Education Policy. Moreover, the Supreme Court has established that the *Parratt-Hudson* doctrine applies to both negligent and intentional tortious acts of state actors, explaining that "it would be absurd to suggest that the State hold a hearing to determine whether a [state official] should engage in such conduct." *Hudson*, 468 U.S. at 533. That reasoning is applicable here. The plaintiffs have not alleged any facts from which a court could reasonably infer that any defendant was vested with "the power and authority to effect the very deprivation complained of here. *Zinermon*, 494 U.S. at 138.[10] Rather, the Sex Education Policy states that "[p]ositive subscription, with parental permission, will be a prerequisite to enrolling," and, accordingly, vested no discretion in school officials. We therefore conclude that the failure to follow the Sex Education

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[10] As the district court noted, although three defendants were members of the School Committee (which adopted the Sex Education Policy), the plaintiffs do not allege that these defendants, either individually or as a group, were authorized to circumvent a policy adopted and enacted by the School Committee as a whole.

Policy was a "random and unauthorized" act within the confines of the *Parratt-Hudson* doctrine.

The second stage of a *Parratt-Hudson* analysis looks to whether the state has provided adequate postdeprivation remedies. *Lowe,* 959 F.2d at 340 (discussing *Parratt,* 451 U.S. 527). The plaintiffs did not argue to the district court that the state remedies were inadequate, relying instead on their belief that *Zinermon* was controlling. On appeal, they do no more than state baldly that "[n]o post-deprivation procedures can undo the damaging influences which were impressed on the students during the performance." Accordingly, we deem this point waived for appellate review, see *United States v. Zannino,* 895 F.2d 1, 17 (lst Cir.), *cert. denied,* 494 U.S. 1082 (1990) (discussing the "settled appellate rule that issues adverted to in a perfunctory manner. unaccompanied by some effort at developed argumentation, are deemed waived"), and therefore find that the plaintiffs have failed to state a procedural due process claim.

III. Free Exercise Clause

Plaintiffs' fourth claim seeks both monetary and declaratory relief, alleging that the defendants' endorsement and encouragement of sexual promiscuity at a mandatory assembly "imping[ed] on their sincerely held religious values regarding chastity and morality," and thereby violated the Free Exercise Clause of the First Amendment.

In *Employment Div., Oregon Dept of Human Resources v. Smith,* 494 U.S. 872 (1990), the Supreme Court addressed a free exercise challenge to a facially neutral and generally applicable criminal statute. The Court held that the compelling interest test did not apply to free exercise challenges to "generally applicable prohibitions of socially harmful conduct." *Id.* at 882-85. The Court explained that the First Amendment was not offended by neutral, generally applicable laws, unless burdening religion was the object of the law. *Id.* at 878-82.

In 1994, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, in response to the Supreme Court's decision in *Smith*. RFRA states, in relevant part:

> (a) In General -- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception -- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. RFRA states that it was enacted to bring the law back to its pre-*Smith* state. *Id.*

The plaintiffs' Free Exercise challenge raises two complex constitutional issues. The threshold issue is whether the Free Exercise Clause even applies to public education.[11] If indeed the Free Exercise Clause applies to the plaintiffs' claim, the question would then be whether their free exercise rights were violated by the compulsory attendance at the Program. Because the Program was staged in 1992, and RFRA was enacted in 1994, however, a cause of action under RFRA exists only if the statute applies retroactively. For the reasons stated below, we conclude

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[11] At least one federal judge has argued that the Free Exercise Clause does not restrict the "prerogative of school boards to set curricula," concluding that school boards' authority in such matters is bounded only by the Establishment Clause. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1078-81 (6th Cir. 1987) (Boggs, J., concurring).

that RFRA does not apply retroactively to plaintiffs' claim for monetary damages.

The Supreme Court has explained that courts should "decline[] to give retroactive effect to statutes burdening private rights unless Congress ha[s] made clear its intent." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1499 (1994). Such an intent will not be inferred where the statute "lacks 'clear, strong, and imperative' language requiring retroactive application." *Id.* (citing *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806)). "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." 114 S. Ct. at 1500.

RFRA states that it "applies to all Federal and State law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." 42 U.S.C. § 2000bb. The statute was enacted to "restore the compelling interest test" and provide judicial relief to persons "whose religious exercise has been burdened in violation of this section." *Id.* While RFRA clearly provides access to declaratory and injunctive relief against all laws burdening the free exercise of religion, we think it lacks the "clear, strong, and imperative" language necessary to create a retroactive cause of action for monetary damages.

We have found no decisions in which a plaintiff was awarded damages under RFRA for conduct occurring before the statutes enactment. Rather, the decisions in which RFRA has been found retroactive considered only the issue of whether to grant injunctive relief, as opposed to an award of monetary damages. *See e.g. Werner v. McCotter*, 49 F.3d 1476, 1479-80 (10th Cir. 1995); *Brown-El v. Harris*, 26 F.3d 68, 69 (8th Cir. 1994) (dicta); *Boone v. Commissioner of Prisons*, No. 93-5074, 1994 WL 383590, 1994 U.S. Dist. LEXIS 10027 (E.D. Pa. July 21, 1994); *Rust v. Clarke*, 851 F. Supp. 377, 380 (D. Neb. 1994) (dicta); *Allah v. Menei*, 844 F. Supp. 1056, 1061 at n.15 (E.D. Pa. 1994); *Lawson v. Dugger*, 844 F. Supp. 1538, 1542 (S.D. Fla.

1994). Equitable relief, however, is prospective rather than retroactive, even when it applies to conduct occurring before a statute's enactment. *See Landgraf*, 114 S. Ct. at 1500. We therefore find that the cases purportedly addressing retroactivity do not support a finding that Congress intended to create a retroactive cause of action for monetary damages under RFRA. Accordingly, the plaintiffs' claim must be addressed under *Smith*, the law in effect at the time of the defendants' actions .[12]

The Supreme Court has explained that a "law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of*

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[12] Even assuming that RFRA created a retroactive cause of action for monetary damages, the plaintiffs' free exercise claim would nevertheless be analyzed under *Smith* because all the defendants with the possible exception of the School Committee are protected by qualified immunity from monetary damages.

As we explained above, qualified immunity shields public officials from pecuniary liability unless they violated constitutional or statutory norms that were "clearly established" at the time of the violation. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Harlow*, 457 U.S. at 818. Because the Program was staged in 1992, the standard set forth in *Smith* (rather than the less rigorous RFRA standard) must be employed to determine whether the defendants violated a clearly established right when they compelled the minor plaintiffs' attendance at the Program. See *Werner v. McCotter*, 49 F.3d 1476, 1481-82 (10th Cir.), *cert. denied*, 115 S. Ct. 2625 (1995) (holding that prison officials were shielded from monetary damages because their acts did not constitute violation of clearly established rights under the *Smith* standard and the defendants could not be responsible for violations created by the change in the law); see also *Young v. Lane*, 922 F.2d 370, 378 (7th Cir. 1991) (applying qualified immunity to damage claims for alleged free exercise deprivations).

the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226-27 (1993) (citing *Smith*, 494 U.S. 872). The plaintiffs do not allege, nor is it apparent from their claim, that the compulsory attendance at the Program was anything but a neutral requirement that applied generally to all students. Cf. *Id.* (where city ordinance violated Free Exercise clause because it targeted the ritual slaughter of animals only by religious groups).

Rather, plaintiffs allege that their case falls within the "hybrid" exception recognized by *Smith* for cases that involve "the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881 & n.1. The most relevant of the so-called hybrid cases is *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972), in which the Court invalidated a compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to school. In so holding, the Court explained that

> *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment.

Id. at 232 (discussing *Pierce*, 268 U.S. 510). We find that the plaintiffs allegations do not bring them within the sweep of *Yoder* for two distinct reasons.

First, as we explained, the plaintiffs' allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with an independently protected constitutional protection. Second, their free exercise claim is qualitatively distinguishable from that alleged in *Yoder*. As the Court in *Yoder* emphasized:

> the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a Statute generally valid as to others.

Id. at 235. Here, the plaintiffs do not allege that the one-time compulsory attendance at the Program threatened their entire way of life. Accordingly, the plaintiffs' free exercise claim for damages was properly dismissed.

The plaintiffs also seek a declaratory judgment concerning the alleged infringement of their Free Exercise Rights. The standing requirement of Article III necessitates that the claimant "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be addressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Supreme Court has made clear that past exposure to harm will not in and of itself confer standing upon a litigant to obtain equitable relief "[a]bsent a sufficient likelihood that he will again be wronged in a similar way." *City of Los Angelos v. Lyons*, 461 U.S. 95, 104-06, 111 (1983). See also *American Postal Workers Union v. Frank*, 968 F.2d 1373, 1374-76 (lst Cir. 1992). Here, the plaintiffs do not allege (nor does it appear) that they are likely to again be subject to school activities that allegedly violate their Free Exercise Rights. We accordingly lack jurisdiction over the claim for declaratory relief and conclude that it also was properly dismissed.

IV. *Sexual Harassment*

The plaintiffs' fifth claim alleges that the defendants engaged in sexual harassment by creating a sexually hostile environment, in violation of Title IX of the Education Amendments of 1972. Title IX provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C. § 1681. Because the relevant caselaw under Title IX is relatively sparse, we apply Title VII caselaw by analogy. See *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1037 (1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899 (1st Cir. 1988).

Title VII, and thus Title IX, "strike at the entire spectrum of disparate treatment of men and women," including conduct having the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986); *Lipsett*, 864 F.2d at 899. As the Supreme Court explained:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Meritor, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (1982)).

The elements a plaintiff must prove to succeed in such type of sexual harassment claim are: (i) that he/she is a member of a protected class; (ii) that he/she was subject to unwelcome sexual harassment; (iii) that the harassment was based upon sex; (iv) that the harassment was sufficiently severe or pervasive so as to

alter the conditions of plaintiff's education and create an abusive educational environment; and (v) that some basis for employer liability has been established. *Id.* at 66-73. See also *Harris v. Forklift SYS. Inc.*, 114 S. Ct. 367 (1993); *Lipsett*, 864 F.2d at 898-901.

Title IX is violated "[w]hen the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive . . . environment.'" *Harris*, 114 S. Ct. at 370 (quoting *Meritor*, 477 U.S. 64-65 (1986)); *Lipsett*, 864 F.2d at 898. While a court must consider all of the circumstances in determining whether a plaintiff has established that an environment is hostile or abusive, it must be particularly concerned with (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating rather than a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. *See Harris*, 114 S. Ct. at 371. Although the presence or absence of psychological harm or an unreasonable effect on work performance are relevant, no single factor is required. *See id.*

The Court has explained that the relevant factors must be viewed both objectively and subjectively. See *id.* at 1454. If the conduct is not so severe or pervasive that a reasonable person would find it hostile or abusive, it is beyond Title IX's purview. See *id.* Similarly, if the plaintiff does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of her employment, and there is no Title IX violation. See *id.* Thus, the court must consider not only the actual effect of the harassment on the plaintiff, but also the effect such conduct would have on a reasonable person in the plaintiff's position.

Turning to the case at bar, we find that the facts alleged here are insufficient to state a claim for sexual harassment under a

hostile environment theory. The plaintiffs' allegations are weak on every one of the *Harris* factors, and when considered in sum, are clearly insufficient to establish the existence of an objectively hostile or abusive environment. First, plaintiffs cannot claim that the offensive speech occurred frequently, as they allege only a one-time exposure to the comments. [13]

We also think that the plaintiffs' allegations do not establish that Landolphi's comments were so severe as to create an objectively hostile environment. This finding is based on both the context and content of her remarks. The remarks were given to the entire ninth and tenth grades at what the defendants labelled an "AIDS awareness program." Significantly, the plaintiffs do not allege that they were required to participate in any of the offensive skits or that they were the direct objects of Landolphi's sexual comments. Moreover, during his introductory remarks, defendant Gilchrist advised students that the purpose of the Program was to educate them about the dangers of sexual activity, stating:

> We [] see young people in their twenties who are infected with the AIDS virus . . . It means they caught the virus when they were in high school, and will be dead before they are thirty years old. That's why the doctors are scared, and they want you to hear the message.
>
> Now, sometimes to hear a message, it takes a special messenger. And today, we have a very special messenger, who uses probably one of the most effective forms of communication -- humor. I want you to listen carefully. Enjoy it, but also remember the message.

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[13] We do not hold that a one-time episode is *per se* incapable of sustaining a hostile environment claim. The frequency of the alleged harassment is a significant factor, but only one of many to be considered in determining whether the conduct was "sufficiently severe or pervasive" that a reasonable person would find that it had rendered the environment hostile or abusive.

Similarly, Landolphi stated in her opening remarks that "we're going to talk about AIDS, but not in the usual way." These prefaces framed the Program in such a way that an objective person would understand that Landolphi's allegedly vulgar sexual commentary was intended to educate the students about the AIDS virus rather than to create a sexually hostile environment.

These introductions also believe the plaintiffs' claim that Landolphi's speech was physically threatening and humiliating, rather than a mere offensive utterance. Landolphi's remarks were not directed specifically at the plaintiffs and were couched in an attempt to use humor to educate the students on sex and the AIDS virus. In this context, while average high school students might have been offended by the graphic sexual discussions alleged here, Landolphi's remarks could not reasonably be considered physically threatening or humiliating so as to create a hostile environment.

Similarly, the plaintiffs' allegations establish that the Program did not significantly alter their educational environment from an objective standpoint. The Program consisted of two ninety minute sex-education presentations, and although the plaintiffs allege that "coarse jesting, sexual innuendo, and overtly sexual behavior took place for the weeks following the Program," they fail to explain how the coarse jesting and overtly sexual behavior "create[d] an atmosphere so infused with hostility toward members of one sex that [it] alter[ed] the [educational environment] for them." *Lipsett,* 864 F.2d at 897. In fact, they allege that the offensive behavior was visited on "those students," regardless of gender, "who were not inclined to accept the message about human sexuality." If anything, then, they allege discrimination based upon the basis of viewpoint, rather than on the basis of gender, as required by Title IX. We therefore find that their claim under Title IX fails.

CONCLUSION

We have considered the other claims of the plaintiffs and find them similarly without merit.

Affirmed.

HOT, SEXY and SAFER

Transcript of a live presentation by Suzi Landolphi
Chelmsford High School, April 8, 1992

SUZI LANDOLPHI PRESENTED THIS LIVE PERFORMANCE, ENTITLED "HOT, SEXY AND SAFER", TO A MANDATORY ASSEMBLY OF NINTH AND TENTH GRADERS AT CHELMSFORD HIGH SCHOOL IN CHELMSFORD, MASSACHUSETTS, ON APRIL 8, 1992. WHAT FOLLOWS IS AN EXACT TRANSCRIPTION OF ALL SPEECH AND MOVEMENTS TAKEN FROM A VIDEOTAPE OF THAT PERFORMANCE, MADE BY SCHOOL PERSONNEL. WORDS IN [BRACKETS] REFLECT SHORT LAPSES OF A FEW SECONDS OR LESS WHERE THE AUDIO TRACK WAS INAUDIBLE, AND ARE SUPPLIED FROM CONTEXT, DURATION OF THE DELETION, AND THE LIP OR BODY MOVEMENTS OF THE SPEAKER.

PRINCIPAL GEORGE BETSES: Good Morning. Will you all just take a seat? Come right in where you can hear the speakers well, please. May I have your attention now? May I have your attention?

This morning we have a very special program. It's being sponsored by the Parent Teachers Organization and the school department. Please, there's a big undercurrent here; we're going to need your attention. All right. It gives me a great deal of pleasure to introduce Doctor Michael Gilchrist of the Parent Teacher Organization, who was instrumental in the support for this particular program. Doctor Gilchrist...

DR. MICHAEL GILCHRIST, M.D.: Thank you Mister Betses. (applause) You know, this program is being presented for you by the High School PTO. It's also being paid for by a bunch of doctors here in town. And you know

why they're paying for it? They're scared. They're scared to death. Right here in our own hospitals, we see little babies who are born who are infected with the AIDS virus. And those babies are gonna die before they're two years old.

We also see young people in their twenties, who are infected with the AIDS virus. Well, since we all know that it takes five to seven years from the time you catch it until you show positive for the AIDS virus, it means they caught the virus when they were still in high school. And they will be dead before they're thirty years old. That's why the doctors are scared. And they want you to hear the message.

Now, sometimes to hear a message, it takes a special messenger. And today, we have a very special messenger, who uses probably one of the most effective forms of communication--humor. I want you to listen carefully. Enjoy it. But also remember the message.

So, with no further words, I'd like to introduce Suzi Landolphi, who's been on national television, People Magazine, everywhere else. Hear the message. Suzi... (Applause.)

SUZI LANDOLPHI: Thank you. Hello. Look at this. This is an amaz--I can't believe how many people came here to listen to someone talk about sex, instead of staying home and having it yourself. Right? You could have done that this morning, but you didn't. Well, I don't know if YOU did or not. (Walks to front of audience, points to a child) I'm not sure, right? (laughter) You won't tell me, right? (Looks at child closely.)

You have no clue what we're gonna do here today, do you? You went, "Oh my God, did she just say that?" You have no idea what we're gonna do here today. We're going to talk about AIDS, but [not in the usual] way. Because the

way most people will come in contact with this virus is through sex. So I think what we need to do today is to talk about sex. Is that okay with everybody? Can we do that? Do you want to or don't you? Let me know?! Yeah? Alright. Okay. Just say, "I think I want to talk about it."

And I know you've (pointing to a student) been talking about it, but you've been calling the 900 lines, right? (Giggle) Don't do that; that's too expensive. Plus the fact that they're a recording. Alright? You can't talk to these women.

Now listen, what we're gonna do--and I don't want to talk about sex, Okay? Because people talk about sex all the time but they never tell you anything. Did you ever notice that? I mean, they'll talk about sex, but they'll always talk around the issue. They'll never really tell it like it is. Why don't we TRY it? How about that? What if we have a group sexual experience? Some people are applauding. Do you want to try it today? This guy's going, "yeah". (Points to a child.) (Giggle)

Oh, this guy. (Points to a child.) I know why you do that. (Raises hand above head in grasping position, and makes up and down stroking motions.) I know what that means! That fella right back there. (Points.) You know when you do this? (Again makes stroking movements in air.) This (makes stroking movements in air) means this, right? (Grasps imaginary object with hand, and strokes up and down in front of groin.) (Group laughter.) It does! Am I right??! That's right! I'm sorry. But wait, wait, wait. I have an explanation. This is your fantasy. (Repeats up and down stroking motion at head level.) This is reality, right? (Repeats up and down stroking motion in front of groin.)

That's right. Always bragging, but never quite making it. Alright, so listen.

What we're gonna do is we're going to have a GROUP SEXUAL EXPERIENCE here today. How's that? Is that good? With audience participation! Alright. So, oh...

I like--oh, you brought a notebook. (Addresses a child.) Is this your notebook? This is great. You can take notes. Okay. No, if you take notes it's wonderful. Can I look at your notebook for just a minute? What's your name? Can you stand up for me please? (Motions for female child to stand up.) Stand up. You can take notes on our group sexual experience, Okay? Because we're trying to find out if there's safe sex, safer sex, the whole thing. And what's your name?

STUDENT: Christy [Last name].

SUZI: Now Christy, if you ever get into a compromising sexual situation, you can check your notes! (Giggle) You can say, "Wait a minute honey, I don't know if we can do that. That might not be safer. Let me check my notes. Oh no. We can't do that unless you turn over." All right. (Giggle) Oh, I don't know which way you had the person.

Alright, now this is gonna be kinda scary for some people, because some people still don't know a lot about sex. Some people know too much about it--or think they do. So here's what I think we ought to do. We ought to clear up some issues first before we start. Fair enough?

And what I want to do about that is I want to clear up one thing about the AIDS virus. Because I want to tell you right now, that even if that virus stops spreading today--I mean, if it stops right today, every single one of us in this room--actually everybody in this town--actually everybody

in the world--every single one of us, is going to know someone and love someone with this virus.

And I don't know about you, but when I find out someone I love has this virus, I don't want to act like a turd. You know what I'm saying? I don't wanna be, "Oh my gosh, you got the virus. [You used to] be my best friend, but no more. Gimme that sweater back too." (Giggle) I mean, I don't want to act like that. And I want to be able to help the person I love.

So I can tell you right now, there's some great new AIDS information out there; brand new stuff that you haven't heard. Most people haven't heard this yet. What I want to do is give you this brand new AIDS information. I want to take two minutes out of our group sexual experience--Okay, two minutes--and I want to talk about AIDS and the rest of the time we'll just deal with sex. Is that fair enough? That's right. (Applause.)

Listen, you guys only [need] two minutes worth of sex anyway, so, (giggle), so I know you're already ahead of the game.

Alright. Here's what I want to tell you: When you get this virus--when you find out someone has this virus--you're told a lot of negative things. Like the fact that you're going to die. WRONG. We found something wonderful to have people do in order to make them live for a long time. When you find out someone you love has this virus, you tell them they can fight this virus, and they might fight it so well that they may never get ill. That's a fact. We discovered you can do something, and its not a drug. We've discovered that you can put up a good defense. Now think about that.

We talk about defense in the military. We talk about defense in terms of sports. Well, you can do something now

with this virus. You know what you can do? You can build up your own immune system. You know that immune system? That's the stuff inside of us that fights off all kinds of bacteria and viruses and everything.

If you get rid of four things in your life, you will build up your immune system so strong that just maybe you'll never get AIDS. You will still have the virus in your body. You can still [pass it] on to someone else, but you might never get sick if you keep yourself healthy. And there are four things that will make you very unhealthy. It ruins the immune system. So make sure when you find out someone you love has this virus, you tell them to get rid of drugs, alcohol, tobacco [and stress].

Oh, wait a minute, wait a minute. Drugs, alcohol, tobacco. Wasn't that all the good shit about ten years ago? I mean, people had that stuff for breakfast, right? "Yeah, I had drugs, alcohol, and tobacco for breakfast." I mean, it's unbelievable what people thought they could get away with. Somehow, we could put this stuff in our body and get away with it. But you can't.

And I want to tell you something about drugs, because if any of us in this room ever tried to buy cocaine--you know, cocaine--it's like that white powder stuff. If you try to buy cocaine--and some people are--I mean, there are people in high school absolutely using cocaine. If [you buy cocaine], well, you're gonna have to cough up a hundred bucks--a hundred bucks--for a little bit of white powder, about that much. And, ah, they're gonna wrap it up in an old piece of magazine. [For a hundred] bucks? I should get a box that should be gift wrapped, don't you think? (Giggle) A hundred bucks?

And now, all of a sudden, you're gonna take this drug home and you're gonna think it's, like, really good stuff. I mean, ah, I'm thinking, like, should we buy something from a drug dealer and think that we really got what we paid for? I mean, is there such thing as an honest drug dealer? That's like jumbo shrimp. How can something be big small at the same time? It can't!

So we're gonna take this drug home and you know what it's gonna be? [It's just gonna be] a lot of white powder called mannitol. Now, mannitol is a baby laxative. The reason that they put that in there is because it doesn't cost anything. They don't want to give us cocaine because they're trying to make money. We're gonna take this white powder home called mannitol, thinking it's cocaine. We'll lay out a line of cocaine and we'll snort it up.

Now, here's my first line of the night. (Pretends to be preparing to snort cocaine.) Here I go: (Pretends to snort cocaine into nose.) "Oh wow. Oh listen. That's, like, really good shit. Oh, speaking of shit, I'll be right back. Hang on one second..." (Runs to side, feigning a trip to the bathroom.) And we'll be out the door sitting on the pot going, "Wow am I high. Boy this is really a lot of fun--I'm glad I did this." (Stoops down, imitating sitting on the toilet.)

And I'm thinking, "Do I need to spend a hundred bucks to poop?" (Giggle) I mean, do you? I don't. One bowl of raisin bran, and I'm good for the week. I don't know about you, but it works that way. [We all of a] sudden bought what we thought was a drug.

By the way, if we do take any cocaine into our system, it ruins the immune system. It really actually puts it down. So I don't know about you. It seems like a waste of time and money in order for me to take any kind of drug and

put it into my system. Antibiotics--if you take antibiotics too long--they can also hurt your immune system. So almost any drug can be very, very dangerous to our immune system.

So, drugs, alcohol, tobacco.

Oh, alcohol. Now, alcohol is a really, really interesting drug, don't you think? I mean, think about this drug alcohol. People going, "Alcohol's not a drug." 'Course it's a drug! Why do people take a drug? To really mess up their mind, right? I mean, don't they really want to, like, change their entire state of their mind. I'm thinking, every time my friends drink, they don't know what state they're in. Right? I mean, did you ever notice someone who's drunk? They've no clue where they are. (Giggle)

And I'm thinking, Okay, but this is--we've got this drug under control, don't we? I mean, don't we, like, make sure that no one--and I know no one in this room has ever taken alcohol until you're 21 years old, right? Right! That's it. These guys are going, "Uh, uh, uh, uh!" (Giggle) And, Okay. We don't have this drug under control, obviously. We think we do, but we don't.

And you know the interesting thing about drugs? And about alcohol? First of all, about alcohol. Did you ever notice how alcohol is marketed? You guys, you guys are pressured into drinking more alcohol than we are as women. I mean, don't you watch television? Every time I watch [television, I see beer] commercials; alcohol, beer commercials, right? I mean, there's lots of beer commercials.

And I think society is trying to tell you guys something. I think that television commercials for alcohol are trying to tell you if you wanna be, like, a really, like, tough kind of a guy, and macho kind of a guy, you gotta drink a lot of beer, and watch a lot of sports. Because, hey, that's what

guys do. So, guys, I guess they're telling you, you better drink a lot of beer and watch a lot of sports and then go pee a lot, 'cause you're gonna do that a lot too, right? I mean, that's obviously gonna happen.

And I wanna tell there's another message in those commercials. Did you ever notice that there's a lot of half-naked women in these commercials? Have you noticed that? [You're] (pointing to a child) going, "Yeah, that's why I watch it, see." Alright. Now, you've watched it, you understand. Did you get the message? You know what society's trying to tell you guys? They're trying to tell you that if you drink a lot of beer and then you should watch a lot of sports, then you should go find someone to have sex with. What a perfect night! Especially if your team wins! Right?? (Giggle.)

And I'm thinking, "Whoa, whoa, whoa." I don't think that message is exactly correct. Because it's been my personal experience that if you guys drink a lot of beer before you try having sex--"humph"--it's going nowhere. (Holds arm out straight and dangles forearm at right angle.) (Giggle) Right? That's right. You might as well hang that one up for the night guys, 'cause it isn't going to happen. You know what I'm saying? You'd be offering it to her like this: (Cups hand at groin.) "Here honey, you want to take this? (Bends down between legs and pretends to pick up.) Oh wait. I dropped it, hang on. (Giggle) Alrighty, take it." That's right.

But wait a minute. Even if it did happen, what is going to happen if you put sex and alcohol together? You know what's [gonna] happen? Most bad sexual experiences happen when one or both are drinking. Did they tell you that in the commercials? Most bad sexual experiences happen

when one or both are drinking. I don't need a bad sexual experience. If you want to give me a bad sexual experience, you can keep it for yourself; I don't need it. Most acquaintance rape happens when one or both are drinking. I don't need that, either.

So I want the truth about [alcohol. It's unbeliev]able. It's unbelievable that we would actually say, "Put sex and alcohol together." You know why we do this? Did you ever listen to [people say I need a] beer to relax or I need a drink to relax? People will say that. "Yeah, I really need to--I want to drink a little 'cause I want to loosen up. (Swivels hips around a few times.)

Hey guys, if you loosen up too much (touches groin), it'll fall off. (Drops hand from groin to floor, as though letting something fall.) Did you know that? (Giggle) So you'll be looking for the bed and go, "Where the hell did that go? (Bends down with cupped hand.) I don't know. I lost it."

It does not loosen us up. That is incorrect. That is biologically incorrect. Alcohol does not loosen us up. "Well, you know, it makes me feel less inhibited. Therefore, if I do try to have a sexual experience, it'll be better, right?" NO! That's not true. It does not make us feel less inhibited.

Well, what the hell does it do? I know it does something to me. Oh, it does something to us. It makes it impossible for us to figure out whether what we are doing would be a risky thing to do or not. Think about it in those terms. When you see your friends drunk, will they risk their reputation by mooning someone? Did you ever see someone do that? (Giggle) Oh, you know what I'm talking about. They'll moon someone, and they go--this guy right over here did it last week. (Points to a child.) That's right, you moon,

and so do you do all that kind of stupid shit, and then you wake up the next day and people tell you about all the stupid stuff you did, right? And you risked your well being.

I mean, did you ever see someone, like, do stuff like balance on top of a railing or roof or something? They cannot see the risk. What about drinking and driving? "Well, uh, I can drive, I can, like, drive; I know how to drive when I'm drunk. I can't see the road, but I can drive." And I'm thinking, "Okay." That's how we think. We cannot see the risk.

And then we try to have sex when we've been drinking, because we can't see the risk. When will we notice that we did something that was risky? The next morning, when we wake up and go, "Oh my gosh, did I do that last night? Is it still there? (Bends over. Looks at and touches groin.) Is it growing anything? I don't (giggle) know." And that's when we'll figure out that something went wrong--something that we would not have done 'cause we wouldn't have taken the risk.

So, drugs, alcohol and tobacco.

Oh, tobacco. I gotta say something. I don't want to put people down who smoke. I really [don't, be]cause I know you're addicted to a very, very, very strong drug. So anybody in this room right now that is a smoker, I want to tell you, you are addicted to the strongest drug that we have.

But if you ask people why they smoke, do they [say to] you that they're addicted to a drug? Do they say, "Oh, I'm addicted to nicotine man; I can't help myself?" And its true?! It's exactly what's happening. And, they'll always say, people always say, "Well, it tastes good. That's why I smoke. I like the flavor."

People chew this stuff. Do you know people that chew this stuff? I mean, they actually pick up something that looks like a cow turd and they put it in their mouth (half giggle), and I'm thinking, "That's weird." And they'll--they're gonna, like, have this swollen lip. Do you guys think that a swollen lip is really attractive? Because, I'll tell you, I've never been turned on when someone drools brown. Have you? It just grosses me out. So that's, like, not cool.

And you know, if tobacco was such a great flavor, how come Ben and Jerry's hasn't made tobacco flavored ice cream? It should work. Did you ever think about that? We should have 'tobacco heath bar crunch' by now. Tobacco definitely ruins the immune system.

So, drugs, alcohol, tobacco and stress.

Uh, oh! Do you know what? Stress is the worst one. Stress is worse than anything else that can hurt, in terms of our immune system. It's the worst. Are we stressed out? I mean, think about it. All of a sudden, you're gonna have finals and the whole thing--summer jobs--I mean, it's gonna be a really stressed life for all [of you because of] this stuff.

Now, what relieves stress? Sex, of course. But that's why we're here. But wait a minute. If you're having bad sex, you're gonna have more stress, right? But that doesn't always [mean you're stressed if you're not having sex], but exercise relieves stress. And I want to tell you that when I go out to Hollywood--I live in Boston, but every--oh, I didn't want to tell you that I go to Hollywood. I go to Hollywood a lot, like, I go there, like, every other week or so. I used to go every week, because I used to be on a daytime television show. Some of you probably see this show. It's on, um, ABC at, I think, nine in the morning. It's called "The Home Show" with Gary Collins. Did you ever see that show?

Some of you people [probably] watch it. It's a really lame show, Okay? No, Gary is such a twit, too. This guy's like a walking Ken doll. Do you know what I mean? He's got nothing up here, (points to head) and I don't think he's even anatomically correct. (Waves hand in front of groin) But anyway... (Giggle) I told him that. I told him that. I don't like the guy too much.

But anyway, so I go out--I want to tell you that Hollywood is very different from Boston. I mean, we would not look the same out there. First of all, everybody goes to aerobics classes, men and women. 'Cause they're the aerobics capital of the world. And everybody wears spandex. I mean, everybody--guys and woman.

Actually, I don't mind when guys wear spandex 'cause we can probably see what we're gonna get before we get there, right? (Giggle) That's kind of interesting. Then they can't brag when they have spandex on, right?

Okay, so anyway, so I want to tell you something that, um, they think no one else ever does any, sort of, aw, exercise. Can I just take a show of hands, right here? How many people here, say, have ever taken one aerobics class? Even just one? Raise your hand if you've taken an aerobics class. Raise your hand high; just raise it. I won't point. That's it. Raise your hand if you're..., high up. Now, everybody look around the room, 'cause there's quite a [lot of you.] Turn around and, wait a minute, wait a minute.

Did you take an aerobics class? (Points.) Did you just raise your hand? Right here? You never took--did he take--an aerobics class? Oh, <u>you</u> did. (Children point to each other.) You did, you never did? He did? (Directs remarks to child.) Come on over here. I want to talk to you. (Child shakes head "no".) Come on over here. Come on

over here. (Suzi pulls him toward the front. The child pulls away, but eventually comes up to the front.) What's your name?

USHI: Ushi.

SUZI: Ushi? Ah, did you take the aerobics class with Ushi? No, you didn't? Alright. Now did I say that right, Ushi?

USHI: "Yeah, you said it."

SUZI: Okay, Now Ushi, when did you take this aerobics class?

USHI: "Oh, I started a couple of months ago, you know?"

SUZI: I'm not sure I believe him, but if you started a couple of months ago you've taken how many classes? Maybe one or two?

USHI: "Yeah, about that."

SUZI: Okay, we know you're really into health Yuthi, Ushi, right? Yeah.

I gotta tell you something. You've gotta take them more than once or twice. You're supposed to take them at least three or four times in a week to get the benefit out of them. So Ushi, I'm gonna tell you something. I'm gonna give you some information that's going to convince you that... (Suzi pulls Ushi's hand out of his pocket, and stares at his groin.)

Now Ushi, I'm trying to talk to you, and you won't pay attention if you do that, Okay? (Ushi folds his hands in front of his pants.) You'll get distracted--alright--and no...(Suzi pulls his hands away.) I won't hurt you. Don't worry. Don't hide.

Now Ushi, did you know... I'm gonna tell you some biologically correct information about aerobics and why you need to take it on a more regular basis. Fair enough? You

need to take aerobics because, see, the same chemicals that release in your body while you're doing aerobics is the exact same chemical that's released in your body during an orgasm. (Group laughter.)
USHI: (Looks away.) "I never knew that."
SUZI: You never knew? He said, "I never knew that". So, Ushi, if you have taken an aerobics class like you said you had, then you should have figured it out for yourself. [tape unclear] You [would have] been going, "Yes, yes, OHHH YEAAHHH!" I mean Ushi, I gotta tell you something. We know you're not taking enough aerobics classes.
USHI: Oh, definitely not.
SUZI: Definitely not taking aerobics classes. But I don't think you're having enough orgasms, either, Ushi. (Giggle)
USHI: (Shakes head "yes") Yeah, yeah.
SUZI: You think you are? Oh, good for you. Let me shake that hand. Oh, it's busy. Okay, thanks very much. Alright, give Ushi a hand. He's a good sport.

Alright now, listen. I can't believe we just said the word "orgasm", do you? I mean, it's early in the morning. It's only eight o'clock and we're talking about orgasms already. And some people might not even know what they are. I mean, that's true. Some people still aren't quite sure what they are--whether they ever had them. Some people call it "coming". Some people call it "orgasm". I'm gonna call it orgasm, 'cause I--and I want to tell you something.

You can't talk about sex without talking about orgasm; but no ever does. Every time they talk about sex, what do they do? They'll [avoid talking about] the issues. Did you ever talk about sex with someone? They never quite get to the point. They'll always, like, beat around the bush.

Oh don't say that. I hate that expression. Don't say that. I hate that. Alright, so.

I think we need to talk about orgasms. And you know what? It's not so difficult. It's not difficult--let me--I've been, like, picking on you all day. Come on, stand up here with me. Come on, stand up here with me. Come on over here. (Signals to a child to come up front.) Come on over here. Turn around.

Lookit. (Points to child's groin, a few inches from his pants.) Look where the hands go, immediately. They, he--look, you've even worn a hole out there. You play with it enough, and that's what happens. You know what I'm saying? What's your name?

JOHN: John.

SUZI: John. We have John here. And I wanna tell you that people, like, make a lot of fun about orgasms and they can't deal with them very maturely. John and I can deal with them maturely. I mean, we understand that they exist and that we should, well, that we should be entitled to them, right, John?

JOHN: Yeah--Okay.

SUZI: Now John, just to show you--Oh, look, we have a camera here. Let's look into the camera and smile. SMILE JOHN, SMILE. Okay. You know why everybody's smiling at us right now? Because they're glad they're not up here with me, Joanne, John. Now, look into the camera, John, and smile, and on the count of three we're gonna show the camera our orgasm faces. (Suzi puts arm around John's shoulder and pulls his face close to hers.) Okay, (group laughter...) One, Two, Three--ERRRRRUGH. (Suzi makes face; John keeps same look.)

Oh, you do a real subtle one, don't you John? He's, like, a very cool guy. He is very cool--low key orgasms. Good for you, John. Give John a hand. I appreciate--give him a hand. He's a good sport. Alright.

Now, I hope that we're on the right track here. I mean, I hope... I've gotta give you a little bit more information about orgasms, because its very, very, important. Did you know that one orgasm--one orgasm--you need to bring this home and tell your parents--one orgasm is ten times stronger than one Valium? You know that Valium, that's supposed to calm you down? Imagine when the pharmaceutical companies--they're gonna be pissed when they hear that, aren't they? And it's true.

And all of a sudden we can't talk about all of this stuff. All of a sudden, we're in a big dilemma. Now we want everybody to change their sexual behavior for the better, and we can't even talk about sex openly.

Well, I'll tell you right now, drugs, alcohol, tobacco and stress are the four things that are ruining all of our lives at this time. It's certainly gonna hurt someone who's HIV positive, but it hurts us all.

Now, if you're ready, if you're ready, I think we can move on from orgasms to exactly why we're here. How and what are we gonna do about safe sex and safer sex? People don't even know the difference. They're not quite sure which is which. Have you heard "safe sex" and then you've heard "safer sex", right? Let me explain the difference. Safe sex is having sex with yourself. Now, <u>you</u> know what I'm talking about, right? (Walks up and points to a child and nods "yes".) Okay, this guy goes...(hears from audience) Oh, <u>he</u> does? (Points to a second child.) How do <u>you</u> know that he does? (Pointing to first child.) Wanna ask you this.

Alright. Safe sex is having sex with yourself, because you cannot give yourself a sexually transmitted disease. You can give yourself a smile, but you can't give yourself a disease, right?

Safer sex is having sex with someone else and lowering the risk. That's the difference. Someday, almost every single one of us in this room will have a sexual experience with another person. Not necessarily another thing, but another person. Okay, that's what I'm talking about here. (Giggle) And we've got to find out what is it that we can do, when we're ready, to lower the risk.

Now, obviously, we can choose not to have any sexual experiences at all. Well, that's not safe sex. That's no sex, right? [So we all start at no sex], and maybe we'll go to safe sex, and eventually we'll probably get to safer sex. So we gotta find what it is. So, if you're ready, I'm gonna make sure that we, um, clear up two issues right now.

One of the things that you have heard a lot of is called "the risk groups". [People] tell you that you don't really have to worry too much about this AIDS, or any of the other 35 sexually transmitted diseases. It's [amazing how many of them there are] now out there, right? That's how many, um, sexually transmitted diseases we have. You don't have to worry, unless you're in the risk group.

And I'm thinking, "Is that true?" I mean, does the virus really know whether or not what group you're in? And I'm gonna tell you something: we have a definition for risk groups, right now. We've been telling people for eleven years that we've got different groups that are more at risk and the people that are most at risk for this virus. This is what we've been told--the people that are more at risk, are who?

Well, that would be gay men. Now, gay men happened to get this virus a lot at the beginning of the epidemic, and so we're gonna keep gay men at the top of the risk group. I don't know how a virus knows whether or not someone's gay or not, but, okay, we'll put them...

Who's next to them in terms of risk? That would be bi-sexual men. Okay, now you know what bi-sexual means? That means you go "either or", men or women, right? Now, think about that. That's a very, sort of, interesting, um, situation, because I think you get a lot more people to choose from, right? I'm not saying you should try it, but [you get less rejection that way.] In fact, you've got people that probably don't get any rejection at all, right? "Hey, I'll take your brother or your sister. It doesn't matter to me. I don't care." (Giggle) Alright? So, that's a bi-sexual, alright?

Now, who's next in terms of risk? That would be I.V. drug users. Now, we don't like these people. I mean, think about these people. These people are nasty people. And I'm thinking, ["I don't want anything to do with these people.] These people are addicted to a drug."

I have people in my family that are addicted to the drug alcohol, but they are called alcoholics. And they have a disease. And every person in this room knows someone who's addicted to alcohol, right? It's called alcoholism, and they get to get some kind of help. Well, how come if you're addicted to another drug, you don't have a disease? I think we might want to reconsider that. Maybe everybody that's addicted to a drug deserves some help. Alright.

And who's next to them in terms of risk? Um, that would be anybody who had a blood transfusion before 1985. But now we test the blood. If you need to get a blood transfusion, the safest--safest--thing you can do is donate

your own blood. But I'll tell you, I don't worry about getting the AIDS virus through a blood transfusion now in my life. I've got to worry about sexual activity first.

And then, um, that's about the highest risk groups that we have, but some of you still look very confused. You want to do an experiment with me right now? This'll be interesting, cause we're gonna try to figure out right now whether or not you're at risk for a virus by being in a group. We're gonna find out whether or not being in a group really puts you at more risk. So now, you need to help me out. I'm going to pick a group. You're going to pick me the person to best represent this group.

I'm going to pick the group of... superstuds. If you're sitting next to a guy and you know he's a superstud, I want you to point to this guy right now, so that I can--we've got someone back there? (Points.) We got someone right here. Okay, wait, wait, we got someone over here. Oh, look it, they're all--I'm gonna take the guy in the blue hat and the blue sweater. Come on down, sir. Give him a hand. Come on down. Okay. (Large cheering.) Come on down. Let him down.

Now, I was very impressed with this guy. I don't wanna tell you why I was impressed. Wait a minute. Stand right up here, sir, with me. I was impressed with him because men and women were pointing to him. Okay, I was impressed. What's your name?

KIRK: Kirk.

SUZI: Kirk. Now Kirk, I don't know whether you're a superstud or not. But, looking at you, I would say you might be. Okay. (Giggle) I don't know! Let me explain why I think you look like one. 'Cause, remember, don't we try to tell how people are just by [looking at them?] Don't

we decide what kind of person they are by the clothes they wear? And, uh, we do that, don't we? That's called judging. So I'm gonna judge you and I think you look like [a superstud.] I'm gonna tell you why Kirk.

The hat is a dead giveaway. A lot of superstuds wear baseball caps. Okay? A lot of them do. That's to hide their "hat head". They always have a hat head. We know that. And, um, also, if you don't care about your hair getting messed up so you never have to comb your hair if you wear a hat, right? And, if you're gonna be a superstud, society has told you, in order to be a superstud you've got to have a lot of sexual experiences, right? Or you're not a superstud. So, if you're hair's gonna get messed up...(giggle) Well, that's what society tells you, right? They tell you, that's right. That's what they tell you.

And so, with that haircut and that hat, no trouble. But you might want to grow the back of your hair long. If you ever decide to be a superstud--no, you see--it gives us something to grab onto, Kirk, beside your ears, Okay? (Grabs back of Kirk's head.)

Now, its really good that you didn't wear good clothes, because a superstud should always wear, like, not good clothes, and these are really not very good. Okay, no, no, no. You don't wanna wear, like, really good clothes that you have to iron, because if you're a superstud, your clothes are gonna be on someone's floor a lot of the time, right? Why wear good clothes? And wear dark colors. This is good. And it hasn't been ironed, never been ironed, and probably hasn't been washed for a week. So, no problem.

Sneakers are good. Always wear sneakers if you're a superstud, because society says you're supposed to have, like, two or three experiences in one night if you're gonna be

a real superstud. And you're gonna have to run like hell to get to them, right? (Giggle) You don't want to be late. And, plus the fact that they're soft soled shoes, so they'll be quiet. That means you can tiptoe out of the room to get to your next appointment without waking her up. I mean, Kirk, you don't have time to talk to these women, too. You know what I'm saying? I mean, if you're too [busy getting to the next one.]

But the pants are perfect. Oh, my lord, these are great! No, no, no, these are really baggy. These are super baggy pants; I love those. And you know what, Kirk? All superstuds wear baggy pants. I bet you didn't know that, but it's true. Yeah, you did know that? And then, I know, I know why you wore those and you know why, but they don't know why. You know what I call those really baggy pants when a superstud wears them? You know what I call them, Kirk? I call those "erection wear"! It's a lot more comfortable, isn't it Kirk?

KIRK: Yes.

SUZI: Yeah, Okay! (Giggle) He figured that out. Alright. Now Kirk, listen. I don't know if you're a superstud or not, but I know society tries to tell guys that that's a good thing to be, and we're trying to figure out whether or not you're at risk for a virus by being in a group. So, I'm gonna ask you four questions, Okay? But don't get nervous, because I'm gonna give you the answers. Isn't that better?

KIRK: Yeah!

SUZI: Yeah, that's a lot better. Don't you wish the teachers would do that--give you the answers? Now, the reason I'm gonna give you the answers is that I don't want to take a risk, either. Because I've met a few superstuds in my life and I've noticed that a lot of them have difficulty

thinking and talking at the same time. (Giggle) Okay, walking and chewing gum--they have difficulty doing that, too. So, when I ask you four questions, you get to say, "Yes, No, No, Yes." Have you got that, Kirk?

KIRK: Yeah.

SUZI: "Yes" is the first one, second and third "No", fourth one "Yes", big "Yes". Okay, got it? Alright. We got--you just stand there like a superstud. I'm gonna tell everybody--I'm gonna ask Kirk a few questions about [his activities]. Kirk, you have to stand there like a superstud. You need a little attitude. You need a little attitude. He's good, he's good. We've got Kirk here. Kirk's gonna represent all the superstuds, ah, in this school, and we'll find out whether or not he's at risk by being in a group.

Now, Kirk, I understand that as a superstud, that you've been with the entire women's basketball team. Is that true?

KIRK: Yes.

SUZI: Alright, Okay. (Giggle) Now you heard it. Now, don't get mad at Kirk. He's been told by society and MTV and everything else that if he wants to be a superstud he's gotta have as many sexual experiences as quickly as possible. And if he does 'em by teams, he gets it over with a lot quicker. Right? And don't get mad at the women's basketball team, because we've been told to put up with this shit. Right? Okay.

Now, have you ever done any I.V. drugs?

KIRK: No.

SUZI: Have you ever had a blood transfusion?

KIRK: No.

SUZI: Well, by society's definition of risk groups, you seem to be not at risk. You know what that means?

That means you can move on to the entire women's softball team. Would you like that?

KIRK: Yes.

SUZI: I knew you would! (Giggle) Give Kirk a hand. Give him a hand. Thank you very much, Kirk. Now, Kirk, I have to tell you something: The softball team said that when you go over there be sure to bring your own bat and ball. Okay, don't forget. (Giggle)

Now, Kirk walks away thinking he is not at risk, because he still believes that you're only at risk if you belong to a group. Now, we've gotta finish this experiment 'cause I'm not convinced. So, now we need to find a guy to represent another group. Can you really be at risk for a virus only by being in the risk group?

So, now, no offense to Kirk, but I need a big guy--a muscle guy. I need a guy that's kind of like a--YEAH! Yeah, the guy in gray. (Points to a child.) The gray teeshirt or white teeshirt. Come on down. Come on down here. (group cheering.) Come on down. Let him get out of the way.

Oh, wowwww...(giggle). I'm impressed already. (Giggle) Come on over here. I'm gonna get ready for this one. Look at <u>you</u>! Whoa. Come on over here. (Giggle) What's your name?

STEVE: Steve.

SUZI: Steve. Gee, I love your teeshirt. It says "The Hardpack". I'm sure it is, sometimes. I bet you wouldn't wear one that said "The Softpack", would you?

STEVE: No.

SUZI: No, I knew you wouldn't. Steve, you are working out. I can see that you are pumping a little iron, is that true? I knew you were 'cause you have bigger breasts

that I do. (Opens her jacket to show chest.) So, I could--I could tell right there that you have.

Now Steve, no offense to Kirk and everything, but you've got some muscles growing there. I don't know if you've noticed that. Nice shoulders, nice chest. Your butt's moving along as well. (Bends over to inspect.) Okay. So, I don't know. You look very male, too. Not that Kirk didn't look male, but you know, with the short haircut and everything you look very macho.

And I noticed that you've got a little bit of growth here. (She touches his chin.) Look at this! Oh that's--I'm gonna tell you something, though. (Giggle) I could grow a better beard than that 'cause I'm half Italian. Okay, so I just wanted to tell you that. So, listen. You look very male and very macho. The black boots, the rolled jeans, the "hardpack". You look pretty macho. And I think the way you look, as male as you look, and as macho as you look, you're gonna be perfect, absolutely perfect to represent gay men. Okay? (Group loud laughter) Look, all your friends are clapping. They're all clapping. Now look, I wanna say--I wanna say something. It's Steve, right?

STEVE: Yes.

SUZI: Steve, I wanna say something. The reason I picked you is because a lot of people--even some of your friends--a lot of people think that all gay men are very effeminate. That's not true. We would like to think that. You know why we want to think that? Because then we could pick people out. And we could judge them just by how they look. And I think some people probably judge you wrong because of your short haircut. I'm sure some people do. I don't want to judge people by how they look. And I know that anybody can be gay and look any way that they

are. And I also want to say that you're probably a very good sport. Are you a good sport?

STEVE: Sure.

SUZI: And, a good sense of humor?

STEVE: Sure.

SUZI: I knew with that haircut you have to have a really good sense of humor. (Giggle) Right, and I know that. Okay? So, here's what we're gonna do: We're still trying to figure out whether or not you're at risk for a virus by being in a group. Fair enough? You represent gay men, and I'm gonna ask you four questions [just like I] did our superstud. Fair enough? And you don't have to change anything about you. You don't have to be effeminate to be gay. Fair enough? Now, when I ask you four questions, Steve, you get to say "No, No, No, YES."

STEVE: Alright.

SUZI: Last one's "Yes". Gotta [be a big] "Yes". You know when you finally bench what you want to bench? You know when you finally get up at--that's the kind of "Yes" that I want. Fair enough? Alright. We've got Steve here. Steve's gonna represent all the gay men here in this school and in this community; and we're still trying to figure out whether or not you're at risk for a virus. I know that guy likes you, but we won't pay any attention to him. (Giggle) Okay, alright. We're still trying to figure out whether or not you're at risk for a virus by being in a group.

So Steve, I need to ask you a few questions. [You don't seem like a person who would do] stupid [or risky sexual activities.] I understand that as a gay man you have never done any risky sexual activity that some gay men have done?

STEVE: No.

SUZI: No, never did, never did. That guy was just a few feet across the room; he just watched. Have you ever done any I.V. Drugs?
STEVE: No.
SUZI: Well, have you ever had a blood transfusion?
STEVE: No.
SUZI: Wait a minute, I'm confused. I'm very confused, Steve. 'Cause for eleven years I've been told that gay men are at the top of the risk group. I mean, you are gay--that is your sexual orientation--and you happen to be proud of it, right Steve?
STEVE: YES.
SUZI: Alright. Heh, heh. Good for you. No, that's good. 'Cause I'll tell you something: My name is not God. I was never given the right to judge another human being. And I'll be damned if I'll judge anybody by their race, their gender, their religion or their sexual orientation. You stay proud of who you are. Everybody should be proud. But we're still confused. Steve, we're still confused because there's a lot of people out there right now that think only gay men are at risk for the virus even though they have done nothing risky. Now is that fair or smart?
STEVE: No.
SUZI: He thought that up all by himself. You saw that. (Giggle) It's not fair and it's not smart, is it? Meanwhile, our super stud Kirk, he's just moved on to the entire [women's soft]ball team. He doesn't think he's at risk for the virus. He thinks you are, just because you're gay. You know what else, Steve? He's been calling you names. Ooh, you're in deep--you're in deep shit, Kirk. This guys' got a few muscles. That's right, [Steve]. He has no right to call you a name even if he disagrees with who you are. He has no right

to call you a name. That's never given our right. But I'm gonna call you a name, Steve. I'm gonna call you a "great sport". Please give this man a great round of applause. You were super. Thank you so much. (group applause/cheer)

There is no such thing as a risk group. There is only risky activity. The only way that virus is gonna get in your body is if you do something to invite it in. It does not matter whether you're gay, straight, black, white, um, Asian; it does not matter. Do you think that virus walks around the earth going, "I'm a virus, but I think I'll only go to the gay guys. That's what I'll do. Now, lemme see if I can pick them out. Oh, he must be gay, but he's straight, he's gay, he's straight." I mean, think about it. Is that the most ridiculous thing we ever did? I think so.

So, if we have risky activities, what is it that won't put the virus in our bodies? You know what that's called? That's called "casual contact". What the hell is casual contact? Someone please tell me. We say, like, this right now: You cannot get the virus through casual contact. It's impossible. You cannot get the virus through casual contact. We've been taking care of people with this for over eleven years. Eleven years we've been taking care of people we love, and no one's got the virus through casual contact. But I'll tell you something.

I said those words out in California, and I was at a high school in California. And this young girl came up to me afterwards, and she was very confused about what casual contact was. And I'm gonna tell you, this young woman must have been from "Wayne's World", okay, 'Cause she had no clue, whatsoever.

This is her definition of casual contact: "You know, like, when you were, like, talking about casual contact? I

was, like, totally freaked out. I mean, I was, like, severely, severely, bumming. And I thought, 'Oh wow, I mean, do I really have to worry about this AIDS virus?' And I thought, 'NOT!' Because you see, I've only been with, like, six guys this week, and that's real casual for me."

And I'm thinking, what is a busy week, right, if six is casual? And you know what? Some people think that.

Some people are doing some stuff right now sexually and they think that it's okay. So, let me put it to you this way; here's a real easy way to remember. I'm gonna give you four things right now that you cannot get the virus from. If you come in contact with these four things, you cannot get the virus. That is casual contact.

You cannot, I repeat, you cannot get this virus through something like spit. Oh, did I just spit on you? Heh, heh. I'm sorry. I tend to spit when I talk. It's gross. I'm sorry. You cannot get it from spit. You cannot get it from tears. You cannot get it from sweat.

Oh, I sweat a lot. I'm sorry if I'm sweating in front of you. I don't mean to. It's not just because I have this jacket on. 'Cause I'm gonna tell you something. I am just a sweaty person. I know I'm not supposed to be a sweaty person, because I'm a women--a woman, and woman, and women do not sweat. Men sweat. What do women do? Perspire. If you go down South, you know what they say down South? "Just glisten a little, honey." Glisten a little? I could illuminate this whole room; that's how much I glisten. And I wanna tell you, it's embarrassing to sweat.

I don't know if this is ever happened to you but--it's, like, a really sweaty person. And you make out with someone. It can really be embarrassing, 'cause if you end up on top and you lean over, it drips right off your nose, right?

And you can't--it's gross--and you can't stop it, right? And so, well, anyway, that's not the worst thing that could happen.

I think it's very dangerous. And I wanna tell you something about this whole sweaty thing and everything. (bell ring) We don't have to go anywhere. I wanna tell you. Did you ever notice on the soap operas, they have more sex than anybody else? Did you ever see them sweat? They never sweat. They also never have a booger in their nose. Did you ever notice that? They never do! They never get a hair in their mouth. Did you ever notice? You'll never see Erika on "All my Children" go, "Huh, just a minute, dahling, I've a hair in my mouth." That'll never happen. And all of a sudden, I'm sweating when I make out, and I know that it's dangerous. 'Cause I want to tell you something.

'Cause some of you--if this hasn't happened to you yet--if you get really sweaty, and, and you get with another person who's really sweaty, and you even get half-naked together, be very careful, 'cause you can slide right off of each other. Okay. It... Oh, some of you know that already. Okay.

Well, listen. That's not the worst thing that could happen. The worst thing that could happen is if you're a really sweaty person and you get with another sweaty person and you happen to get really naked with that person, be very careful and watch out for that suction noise! Okay? 'Cause that's--Oh, oh. Some people are smiling. They know what that...(points to a child) Look at this woman going, "Oh, <u>that</u> suction noise" And I'm terrible. It's awful. You'll make a suction noise if--I'm gonna tell you something.

People won't tell you about what happens when you try to have a sexual experience. They'll never warn you, and

if you make a suction noise when you've been making out with someone, what're you gonna think; it's gonna be quiet? You think everythings' Okay? You're probably doing this in the dark, under covers, with your eyes closed. And all of a sudden, what will you hear? (Suction noise)

"Did he fart?" (laughter) And you know why you'll think that? Because you guys will never ever tell us when you're gonna fart. Did you notice that? Guys will announce it to their buddies, "Hey I'm gonna fart in, like, five minutes. Yeah, it's gonna be a great one. It's from that chili last night". Did he just fart? Is that why he gotta--he announces it, right? It's bleah. It's the worst thing. And I wanna say something.

I just want to let people know that we've tried to have sexual experiences in a very unique, and, I think, wrong way. 'Cause you know what happens? We try to have sex before we even know about this suction noise. We try to have a sexual experience before we know anything! And how do we try to have them? Most of the time when you hear about your friends having a sexual experience or you [do, you wonder:] How does it happen?

Well, first of all, we go to a party, right? So, you go to a party. And then, what do [you do when you] get to the party? I don't know. You drink, like, what, a case or two of beer? Alright? People drink a lot of beer and they're really, really messed up. And at the end of the night they grab someone. Right? They can't see the person, but they grab them anyway.

And all of a sudden, we found this person; we don't who he is. We start making out with this person. We don't even know their name! We start to make out with them for, like, what we've seem it is really long time. For, like, what,

ten minutes? So, we start making out with this person for, like, ten minutes, and then we know it's time [to take our clothes] off. But you can't tell the person it's time to take their clothes off. Why? 'Cause we don't know their name, right?

So, Okay. All of a sudden, we start to take their clothes off, and then we start to take our clothes off. They start to take their clothes off, but we keep kissing. Remember, you can never stop kissing when you're taking your clothes off. Why? 'Cause then you have to acknowledge it. You have to look at this person and realize you're taking your clothes. If we keep our eyes shut, then we can pretend it's not happening. So, we keep our eyes closed and we keep kissing while we're taking our clothes off (pulls at clothes, and lifts leg), which is a very difficult thing to do, 'cause that's when the sweat happens. Okay?

Then, all of a sudden, we wake up for one second. We get, like, sorta sober for one second: "Huh? I'm naked with someone I don't even know." Talk about embarrassing! So, we moosh together really quickly, right, to hide our nakedness, and that's when air gets trapped between our breasts, causing a vacuum. And when we pull apart, that's when the suc... Uh, oh.

I bet when two women are together they make a huge noise, right? (Giggle) But wait a minute. We're not gonna judge someone's sexual orien... And when two guys are together, they'll just make little noises. But, Steve, you're gonna make a big noise, no matter who you're with. (Giggle) It doesn't matter. With those pecs, you're gonna make a big noise.

NOW LISTEN. How come that's the way we're having sexual experiences? Who told us it was a really smart

thing to go to a party, drink a case of beer, grab someone you don't know and have a sexual experience... (bell ringing) ...and have a sexual experience with someone w[hen we don't] talk, and we don't even know their name? Who gave us that information? That's what I'd like to know. Because, I'll tell you something. It doesn't work; it doesn't work.

So, what can we do? And you know what we can do? We can try something different. We could change this entire--entire, entire operation. So, in the few minutes we have, this is what I'd like to do. Now, we know that it's not casual contact. We know that's it's, like, not tears that's gonna give it to us. Not sweat. It's not our saliva and it's not boogers. That's the fourth one: boogers, okay? Those four things are not gonna get any kind of sexually transmitted disease in our body. But there are things that will. So why don't we--well we'll talk about that now, and we'll even try some of the safer ones. Are you ready? Here's what I need to do.

We need to talk about our private parts now. And I need to talk about them in detail, okay? And before I do, I wanna say one other thing.

I want us to remember that you cannot get this virus through anything else that you do in your daily life [with your] friends. You will not get this by sharing a Coke with someone. You will not get this by, um, sharing anything in your bedroom, or your bathroom, or even a toilet. You will not get it.

Can I ask you people a question about toi--I share a lot of toilets. Can I ask you, do you get really upset when you sit on a wet toilet seat? Can that, like, ruin your whole day? I think--can I ask the guys a question? What's the matter, guys? This toilet bowls' not big enough to pee in

yet? I mean, what should we do with you guys? Dig you a trench and send you outside?

And I know, listen--And I know women can dribble on a seat. But there's only one time when that we ever dribble on a seat. When is that? When we're in a public bathroom in high heels, right? Did you ever, like, go in a public bathroom in high heels and then you're, like, leaning over the seat, like this, like you don't want to touch it? And then you have pantyhose pulling your knees together, (giggle) right? (Demonstrates) The women are going, "I remember that."

But when you guys dribble on a seat, you deny it. "I didn't do that. I went in there, I put the seat up, I peed, then I put the seat back down so your butt wouldn't hit the water." (Giggle) I said I appreciate that, because I hate falling in the water. But I think some guys, you... Sometimes you forget, guys. You go in there, you put the seat up, you pee, then you put the seat back down. Oh, and then you shake the last few drops right on the seat! (Shakes hand in front of groin.)

Can I ask you guys something? In all honesty? What are you taught? Are you taught to shake this up or down (shakes hand up and down at groin), or sideways (Shakes hand sideways at groin.)

Kirk, don't do this, Okay? (Circular hand motion like a lariat at groin.) Well, if he's a superstud, I'm sure he could. (Laughter) It may be very impressive, but don't do it, okay?

Now, I don't want to go off the track here, but did you ever notice that little boys and little girls don't have any trouble peeing together. Little boys and little girls are not embarrassed to go into the same bathroom together and pee together. Are we embarrassed? Damn right we are!

As we get older, we know less about our private parts and we are more embarrassed than when we are younger. When we are younger, we know about our private parts. We're less embarrassed. Why is that? With all of us sitting in this room right now--I mean, have you ever really sat down and thought about your private parts? How you view them? Did you ever think about them?

Oh, I just said "view" and every guys' head went like this. (Leans head down to front to look at groin.) Unbelievable, unbelievable. I know that's that what you're thinking. That's not what I'm talking about. I, well... wait a minute. We should talk about that, because think about this.

Every guy in the audience right now has viewed his private parts at, what, at least four times today already. It's only 8:30 and you've probably viewed your parts three times to pee, one time to admire it, right? This guy (points) goes, "Yeah, I admired mine this morning." (Giggle) Okay. That means every guy in the audience that knows his private parts so well, that I bet if we took polaroid pictures of all you guys naked from the waist down, and if we had an imaginary--if we had a wall back here and we put those pictures on the wall, you could pick yours out. Right?

I mean, Kirk, could you pick yours out? You could. That's right. You'd walk right up there and you'd look on this wall and go, "Okay, lemme take a look here... hang on... Oh, there's Joey's. That's Joey's right there--I've seen that a couple of times. Oh, there's mine right there. It kinda curves to the left. That's mine."

You do that for women, I think we would be in trouble. (Demonstrates picking out a picture.) "Oh my gosh, I can't believe they're asking us to do this. But maybe if I look this way; no, that doesn't help. Hang on one second.

No, look, I can't pick mine out 'cause I know, well, see, I've never actually seen my private part, so I don't have any idea which one mine is."

Now, why is that? Why is it that boys can pick out their private parts and like them, and we can't? You know why? Think about how difficult it is for a woman to take a look at her private part. Think about what we have to do just to take a look at it. First of all, we have to sneak into our own bedroom. I mean, try telling your girlfriend or your sisters, or any of your friends tonight, "Listen, I'm gonna be a little late for dinner tonight because I'm gonna go in there and take a really good look at my private parts, okay." (Giggle) That'll go over big.

So you go into the bedroom. Make sure no one sees you. You go up to the bureau. Now this has to be the bureau with the mirror attached. It will not work if you don't use the bureau with the mirror attached. Lay the entire bureau down on the ground, stand back and take a running leap. (Leaps) "There it is! That's what I wanted to look at. Oh look at this. This is a great thi--I didn't know. Oh, look what it can do? Look it..." (Squats up and down, bends over looking at floor.)

Jeez, I'm really sad. Um, I'm sorry that I just said that, because I realize that there's gonna be a lot of bureaus on the floor tonight, right? (Giggle) Some father's gonna come in tonight and go, "What the hell's that bureau doing down on the floor?" "Oh, nothing Dad. It's just a new way to blow dry our hair, Okay?"

Now, wait a minute. I don't want everybody to leave this room thinking that we cannot take a look at our private parts, or that it is very difficult. It's not difficult, physically. Physically, we can look at our private parts very easily.

Emotionally, it's terrifying. Why is it you guys like looking at your private parts and we're terrified at looking at ours? You know why? Because of how society brings us up. Now think about this.

Think about what society has told you guys and your private parts. What has society told you already about your private parts? You own the best private parts in the whole world. You are told from a young boy all the way up to manhood, that you have the best private parts going. Listen you guys; I wanna tell you something.

You guys own the best private parts in the whole world. This is the most important thing you'll own, besides your car. (Cups hand in holding motion at groin.) It's a great thing you got here, and you can walk around, you can hold it all day, you can show it to people. Why? 'Cause it's yours! And it was put on your body for your pleasure. "Go on out there and use it! Yeah!" Alright, that's what guys are told.

Now what are women told by society? "Okay, listen, um, yes, we have private parts too, but they're kinda gross. Don't ever look at them; don't ever touch them, and by the way, they're not really yours. I mean, they were put on your body for someone else, so just wait long enough and someone will ask to use them, thank you very much." Does that make any sense?

Think about what just happened. You guys are told to love your private parts and use them whenever you want, and we're told ours are gross? Wait a minute! My private parts are not gross. I know they're not gross. I have looked at them. And I want every young woman in this audience to take a good long look at her private parts tonight! I want you to know your private--that's right--tonight! I want you to

know your private parts so well you could pick them out in a crowd if you ever had to. Okay, now, not that I hope you'll ever have to. (Giggle) That's right. Now think about this. You'd be very embarrassed. You, as young women, will be embarrassed to look at something on your body that belongs to you!

[Our private parts] were not put on our body for someone else. These are our private parts. If John's were put on his body for his--his pleasure and his control, yours were put on your body for you, not for him. For me, they're my private parts. And you know what? When you look at it the first time, you'll be embarrassed. But keep looking, because then you'll realize it's neat! It's wonderful! It's terrific! It's not gross! I gotta say something about "gross". Guys, you've got something that looks like turkey neck skin. You know what I'm saying? (Giggle) It's not pretty. It's not cute. It's not gross. You're not gross. We're not gross. They are private parts. And they are ours. And they were put on our bodies for us. I'm in charge of my private part. I don't care what society tri[es to tell me.]

[You] see, at one time, women belonged to men. You realize that? We were actually property of men; therefore they believed that they owned our private parts. Society keeps trying to tell us that men deserve our pri--they're entitled to them. Wait a minute. You're entitled to your private parts. You can do whatever you want with your private parts. But my private parts are MINE! I'm in charge. I'll decide who gets to look at them, who gets to get involved with them. And, uh, you know what? I'll tell you something.

The more you like your private parts and the more you look at it, the better care you will take of your private

parts. Think about that. When you really like a sweater, when you really like your car, when you really like something, don't you take better care of it? Well, if you don't like something, you won't take good care of it. You'll be too embarrassed.

Now, I'd like you to go a little bit further here today. This will embarrass some people. 'Cause now I am going to tell us how we work. See, that's the other thing. I'm not going to talk about the plumbing. I'm gonna talk about how we work as men and women. And I need to talk about the private parts in detail and I don't wanna embarrass anybody.

I wanna show this is on television. I wanna show the people who watch this how mature we are. They're gonna think that as freshman and sophomores, we're not mature. We can't handle that. I'm gonna prove that we can.

So, I'm going to come up with words for the male private parts and words for the female private part that are very sophisticated.

Now, for some of the faculty, for some [people] here--teachers and the administration--I know that they may not have had too much sex in a long time, so... (Giggle) I'm only joking; I'm only joking. Just watch out for those stressed out ones, okay? And don't be flip and say, "You know, Mrs. Sharp, I think you need an orgasm." Don't [do that], okay? Alright. I was only joking. Here's what I'm gonna do. Are you ready?

I'm now gonna talk about the male private parts and how they work, and the female private parts and how they work. And when I talk about the male private parts, I'm going to use a very sophisticated, mature word. So, if some of you have never heard these words, I will explain. But I don't want to embarrass anybody.

When I now talk about the male private parts I'll refer to it as your "wiener". How's that? (Giggle) That's pretty mature, isn't it? Very sophis--How about your "lucky dog"? I always loved that one. Or, "Mr.Happy"? Look at Kirk smiling. Mr. Happy... (Giggle)

You know what? You guys have so many words for your private parts. You know why that is? Because, because guys are always talking to it. Did you ever notice that? Guys--no--guys will talk to their private parts: "Hey, come on, Mr. Happy; We've got a date. Let's go." (Cups hand, holds to groin, looks down.)

You'll never see a woman do this: "Hello, hello..." Thank goodness we're smart enough not to do that. Okay.

So, we've got wieners for the guys. When I say wieners, I want everybody to picture one penis, two testicles. Can you do that? Picture one penis, two te... Uh, oh. What if you only have one testicle? You're still included. Is that okay for you, Kirk? Kirk goes, "No problem." (Giggle) Okay. "As superstud, I have five." Okay, alright. A few extra in case. Okay. So we're gonna talk about one penis, two testicles; One penis, one testicle.

And when we talk about women's private parts, we'll call it the what? The "noo-noo". I just made that up. Okay, so, our "noo-noo". But wait. I have to describe what the noo-noo will include. And you know what? Here's another difference.

You guys are told that you have the best private parts in the whole world. You're told to go out and use them. You're told that some of you are entitled to have as much sex as you want, and we as women, we're not [told what to do with our private parts] and how we work.

How many private parts do we mention when we talk about women's private parts? When we actually would sit down and discuss female private parts, how many parts do we mention? One. We mention one part. Do you know that women have more than one private part? We do. But what's the one private part we're always talking about? The vagina. Right. I mean, that's the only thing we ever talk about. We talk about women's private parts, the only part we talk about is the vagina. If we're gonna talk about women, then we talk about their vaginas. If we're gonna talk about vaginas, then we're obviously talking about women. If we're talking about women, vaginas; vaginas, for women.

Wait a minute. Does that make us sound like a walking semen receptacle? That's not my lot in life. That's not why I was put here, to collect that, okay? And you know what's interesting?

People don't even know about this private part; they don't even know about it. Most men and women can't even find it. Now, I know it's small. Maybe that's the problem. See, this part of a woman's body is only about--well, I don't know--I've never actually measured it. I'm not sure. But I think it's about that big. (Shows size with fingers.)

And I looked it up in the dictionary because we can't even pronounce it. We don't even know how to pronounce this part of a woman's body. This is a very important part of our private parts, and I want to go on record right now to say that there are two ways to pronounce it.

When you want to talk about this part of a woman's body which is just in front of the vagina, you can either say CLItoris, but I looked at mine and mine does not look like a CLItoris. Does yours look like a CLItoris? (Bends over and addresses a female child.) When you take a good look at it,

does it look like a CLItoris? (Child bends head down deeply, and does not answer.) (group laughter) I don't--when you look at it tonight, you call me and let me know, okay? I think that it looks like a cliTORis. Oh, doesn't that sound better? Listen, listen, listen. CliTORis. I have a cliTORis. Wait a minute, wait a minute, wait a minute.

Do you think that sounds a little bit like a prehistoric dinosaur? Think about it: Brontosaurus, cliTORis. That does, doesn't it? That's good, because it makes it sound important and big. It doesn't have to be big.

I know you guys worry about how big you are. I know when you go [into the locker] room you check each other out, worrying about how big you are. You know why? Because society's done a terrible thing to you. Society's told you guys that you have to worry about how big your wiener is. That somehow that will make you a bigger guy. You guys are walking around suffering from "protectual wiener worry". You are! You're always worrying about how big you are: "Gee, my wiener's not big enough. It only wraps around my leg twice. That's not big enough". RIGHT. And I'm thinking, don't worry about that.

And women, don't worry about our private parts being small. It doesn't make any difference. They all work the same. Well, let me tell you how they work. That's what we've got to change.

You guys know how you work. Almost every man in this room has either experienced an orgasm by himself, with someone else. Almost every guy in this room probably has experienced--you've at least experienced an erection. And you know damn well that someday when you have an orgasm, that semen is gonna shoot right out of your wiener, right? And guys always brag about that: "I could hit that

light." (Giggle) A little bit of bullshit going on there. Okay. So what are we saying?

Do women know how they work? Do women know how they work? Do we talk about how women work? No! We, in fact, if you ask most young women right now how and where are you going to have an orgasm; where does your orgasm come from? Where is it right now?

"My what? My orgasm? Oh, is that next to the carburetor in the car? No, no, no, no, that's not what--Oh, I know. Oh, I know. Orgasm. Of course, I read about that in Cosmopolitan Magazine. Okay, orgasm, yes. See my orgasm--a woman's orgasm is waiting in her vagina for the big wiener from the sky to come down and release it. That's not true? I thought that..."

Do you know that women still to this day in 1992 think that? Do you realize that women still don't know how to sexually satisfy themselves because we of society never cared about women and their sexuality? Never. We only cared about you guys, so we gave you guys the message that you deserve and need more sex than we do. And that you have a right. And some guys even take it from us, which is definitely not right.

So I want to go on record right now to tell you exactly where the woman's orgasm is. I'll tell you right now. Our orgasm, by the way, is not waiting in our, in our vagina for the big wiener from the sky. But you know what? Some women, some very young women, are putting a wiener in their noo-noo right now as we speak. Well, not right this minute. But they have tried it. And you know what happens when they don't know how they work and they try intercourse too soon?

"Oh my gosh, there seems to be a wiener in my noo-noo right now. And he's, ah, moving it back and forth, back and forth, back and forth. (Rotates pelvis from side to side) And look at his face! He looks like he's gonna explode! And, uh, I don't feel anything. Oh my gosh, I must be broken. Oh, I don't want him to think I'm broken, so I'll just pretend that somethings' happening. So I'll do what he's doing. What's he doing now? Okay, he's making that face. Okay. And now he's making a noise ....uhh.....ahh...uhh...ahh..uh-ah-uh-AAAAAAHHHH! Geez, I hope he believed that. That was my best one so far."

Now, why do we always make jokes about women faking orgasms? You know why? Because a lot of women really don't know how they work. And a lot of women are allowing themselves to be used to give someone else an orgasm. I want to go on record right now.

I am not responsible to give another human being an orgasm. My body is not put on that earth to have someone use it for their sexual satisfaction. That's not why I was put here. My job is to find my own sexual satisfaction. My job is to be in charge of my body, to keep it as healthy as I possibly can.

Can I help someone have an orgasm? Yes. Am I responsible to give them one? Or let them use me for one? No. We want to talk about, discuss it, plan it, then maybe we can help each other to have an orgasm. As long as we do it on terms that are comfortable for me. That I'm ready for.

So, I want to go on record right now to tell every woman that her orgasm is not waiting in her vagina. Our orgasms are not even in our vagina. They are in our clitoris. And our clitoris is on the outside of our body, not on the inside. Do you know what that means? That means we don't

have to put a wiener in that noo-noo, ever, if we don't want to. Because that's not going to sexually satisfy us anyway. 99% of all positions of intercourse will never bring a woman to orgasm. 99%. You know why? Because we don't work that way.

You guys? You work that way. But you can have other ways to have orgasms. I know damn well if you're right handed, or you're left handed, it will work either way. I know that. I know you don't need my vagina to have an orgasm. And I definitely don't need your wiener to have one.

I know that my definition of sex has changed. If I asked anybody in this room last night if you had sex last night... If I asked... First of all, it's none of my damn business, right? But you have enough watches to be able to time them, right? I know, but you know if I asked any person in this room if you had sex, would you know what I meant by that If I said, "Did you have sex last night?" If you put the wiener in the noo-noo, right? That's what I mean. Okay. If I ask anybody if you slept with someone last weekend, would you know what I meant if I said, "Did someone sleep with someone?" It would mean the wiener and the noo-noo, right? Am I right? Of course.

I know that there's a lot of people that have slept with people and never had intercourse. We can't use those words any more.

And you know what else? Right now, when you read about this in the newspaper tomorrow, the reporter has to use the word "sex" to mean intercourse. When you watch a talk show, they don't say the word "intercourse". They use the word "sex", right? That means that every single one of us in this room think, right now, that if we're ready to have sex,

we have to have intercourse. That's the only real sex there is. That's wrong.

There's a whole new definition of sex that I all of a sudden discovered. I know that there are 2,862 ways to sexually satisfy myself and my partner without intercourse. You want to write that down in case you forget that? 2,862. I know that because I'm up to 1,907, so I know that.

And I know right now that society has made [a big mis]stake. They're telling young people through television, through MTV, through all the things that I love to watch--soap operas, movies--that the only way to have sex is putting that penis in the vagina. Well, there's other ways. But we don't call it real sex. "Did you do it?" And the word "do it" means put the penis in the vagina. We don't count the other ones. And all of them have risk.

I think everybody should be in charge of their own orgasm. I think every young woman and young man should know how they work before they hook up with someone else. Do you know that most young men, the very first orgasm they will have will be with another guy? Think about that. Does that mean they're gay? Of course not. It means that its easier to experiment with someone that has the same equipment that you have because it's less pressure. It's easier. Most young men will experience their first orgasm with another guy. That does not mean that they're gay.

But, unfortunately, 50% of all teenagers who commit suicide do so because they do believe that they are gay, and this society says that you are bad and you are worthless if you are gay. I don't think that there is any parent that belongs, or is in, in, in, part of a family here right now. I don't think any one of your parents would want you to die over finding out that you were gay. No one.

How come we can't talk about this stuff? How come we can't talk about how we work? You know how to blow your nose. You know how to go to the bathroom. We need to know that.

Now, in the last few minutes that we have left, I'm gonna give us the three high risk activities. These are the three ways you can put this virus in your body, or any other sexually transmitted disease. And then we're gonna go on to what is safer. What can you do to lower the risk?

When you decide to have a sexual experience, we won't be there. You'll have to do that on your own. But, when you are there on your own, I hope you have some information to help you out. And some self confidence.

If you can't take a look at your own private parts, you're not ready to have a sexual experience. If you can't touch your own private parts, you're not ready to have a sexual experience with someone else. If you don't know where your orgasm is, you're definitely not ready for intercourse. If you're having intercourse in the dark, under the covers, with your eyes closed, you're not ready. That simple. And I don't care if you're 14 or 54. You're not ready.

The three high risk activities right now to put this virus in your body: The first one is called anal intercourse. That's when you put a wiener in your rear end. Okay. Have you got a good picture about that? (Giggle) People are going, "Oh, gross. I'd never do that; who would do that?"

Do you know a lot of people do this? You know why? They do it because they won't talk about it, so they're gonna try something that's really, really mysterious. They wanna know why no one will talk about this.

Not only gay men, let me tell you this. Not all gay men try anal intercourse. We have young women and young men trying it. Some teenagers use it as a means of birth control. When you put the wiener in the rear end and you put semen, or 'come', inside of a rear end, you cannot get pregnant. So, some people say, "Well, I'd rather do that than worry about get-...hey, I'm still a virgin." If I just put a wiener in my rear end, how do you figure that? Well, I didn't actually put it in my vagina. Well, hey, I've got news for you. You're splitting hairs right now.

And if you put a wiener in a rear end--I don't care whose rear end you put it in--that tissue inside of a rear end is very delicate. It can rip and tear easily. If you don't believe me, the next time swallow a walnut shell; you'll realize that on your own.

You put a wiener in a rear end, it breaks up that tissue, you deposit semen with HIV in it, because there's only three fluids that can transmit this [virus in your] body. Semen--what comes out of the male penis. Semen, vaginal fluid, or blood. Those are the only three things that can put that virus in your body. You put semen in your rear end, it goes right into the blood system. Great means of transmission. One of the best we know.

You know what I tell people? Don't try it. Don't put a wiener in your rear end. I don't care what someone says. I don't care what you want to discover. It's too risky. And if you are, then you gotta use a condom. But you know what? Condoms break. They break when you've got a wiener in your rear end, you're in deep shit. Oh, I don't want to say that. (Giggle) Forget that. That's kinda silly to say. (Giggle)

If, you know what I say to my friends? If you really think you have to try it, if this is something you have to absolutely do, you better wear two condoms. You know what I really hope? By the time they get the second condom on, they'll forget where they were going to put their wiener. Right? They'll go, "Geez, it took me forty minutes to put these condoms on. What the hell was I gonna do with this? I don't know." I hope not!

Anal intercourse. One of the highest risk activities that we have.

Can you play in that area when you are old enough and feel responsible enough? Yeah. It's a part of the erotic area. It's close to everything else: the clitoris, the testicles, the whole thing. It's all there. Putting a wiener in there is the highest risk activity.

Second highest? Vaginal intercourse. When you put the wiener in the noo-noo. You 'knew-knew' that though, right? Very high risk. Is it high risk for just women? No. Is it higher risk for women? Yes, because you are depositing semen in the vagina and that can lead into a woman's blood stream. When you put a wiener in the noo-noo and you start moving it back and forth, and it's dry, you can cause minor irritations inside of the vagina. Did you know that? Little tiny microscopic irritations. You deposit semen; that HIV will go right to a woman's blood stream.

Does that mean you guys can't get it? Of course not. Know why you guys never think you're gonna get sexually transmitted disease? Because society tells you that your wiener is indestructible. Right? You're brought up to believe that you, especially when you get an erection.

That's when you think it's, like, some kind of a ginsu knife or something. (Giggle) Right? "Hey honey, watch

this...boomf." (Giggle) It's not a ginsu knife. You guys are [aware it's] not a ginsu knife the first time you ever catch yourself in a zipper. Right? You'll know damn well it's not indestructible at that moment.

Okay. You put a wiener in a noo-noo; you move it back and forth; you can get rubbing sores on your penis. Those rubbing sores lead into your bloodstream and the HIV virus is small enough to get in there.

And the third one--and I hear that this is real popular in high schools right now. It's gained popularity because of the talk about AIDS. And that's oral sex. That's when you put your mouth on a wiener, you put a wiener in your mouth, you put your mouth on a noo-noo, you put your tongue inside of a noo-noo. I forget any? Who's gonna tell me, "Well, you forgot one; it's my favorite; let me describe it to you." That won't happen.

Can you get the AIDS virus through oral sex? Yes, yes, yes! Two women together, two men together, man and women together. Yes, yes, yes. You can. It's a little less risky than the other two, but it can happen.

So, what do we do now? Well, every time we do any one of those activities--you put a wiener in the noo-noo--you better have a condom; you better know how to use a condom correctly. Condoms can break, and especially will break, if you don't know how to use them correctly. And every time you have an orgasm you better pull out. 'Cause if the condom breaks at the moment of, uh, of orgasm, then again, you have lost all your protection. No orgasm should be happening inside of anybody's body.

And number two, in terms of oral sex. Yes, you have to use a condom on that wiener. But what if you're performing oral sex on a woman? What do you use then? Well you

know what? You're gonna read pamphlets that say a dental dam. What the hell's a dental dam? It's an ugly, uh, thick piece of latex that dentists put in your mouth. Did they ever do that when they were performing surgery on your mouth or something? And how are you going to get your hands on a dental dam? "Um, gee, Dr. Dentist, could I take that home with me? I have a heavy date tonight." I don't think you'll ask for it. So, women who love women got very smart. Know what they started to use? Saran wrap. And it works! I'm serious. People are taking this serious enough so that they'll try things in order to lower the risk.

Do you get rid of all the risk by using a condom? No. Do you get rid of a lot of it? Yes. So what can we do? What if we really want to lower the risk even more than using condoms. Well, we could try something else.

This is my definition of safer sex. My definition includes three things. And if you don't have these three things in your relationship you will not be able to practice safer sex. These are the three most important things you will ever have in a friendship, in a family, and in a relationship--a love relationship and a sexual relationship.

My definition of safer sex includes communication, number one. I hate that word. I say talk. If you can't talk to your partner--if you can't tell your partner what it is, how you want to do it, where you want to do it, you're not ready to do it. You gotta say the word. You've got to say the word.

And when you do say the word, the second one is honesty. If you are lying to your partner about anything, you're not ready for a sexual experience. And remember, we've redesigned the word "sex". So, I'm talking about anything right now.

And the third one is trust. And guess what? Don't come to anybody and say, "Well, I talked with him for four hours and I really trusted him." We do not build trust in four hours, four days, and not even four months. It takes a long time to trust someone. Think about who you trust right now in your life. Think about it. You don't trust easily. It's scary.

Communication, honesty, and trust.

Let me show you communication. I need the bravest person in the world to come down here right now and do something with me. In fact, I could take a man or a woman right now, but if I took a women, some people would go, "Oh my gosh, two women together." Some guys would go, "Oh, good, great; two women together." Oohuhh. I don't want to support that. I want to make sure that we understand that there are different sexual orientations. So I'll bring a guy down here with me right now, and we'll try something.

I want a guy who would like to have a physical experience with me. Is there a guy who's brave enough that would like to have a physical experience? Kirk, I know you would! Okay, come on down Kirk; come on down. (Lot of heckling from crowd as Kirk comes down.) Still got on those erection wear? Alright. Now, Kirk, listen. You've been a great sport today, okay? We've, I mean, we've already, like, harassed you once. But this is gonna be a great experience for you, Okay?

KIRK: Sure.

SUZI: Now Kirk, Kirk, is it Okay? We're gonna do a whole experiment on communication. Is it Okay if I, like, do something physical with you?

KIRK: It depends.

SUZI: Okay, he says "it depends", so he's thinking about it. Let me give you a little more information. But it's an experiment. I can't give you a lot. Is it okay if I try to get you to do something physical, and I try to get you to do it with just my body?

KIRK: Sure.

SUZI: He's really cooperative. I like that. Now, Kirk, one other thing. When we do this, you're very brave, 'cause you volunteered. I didn't pull you down here, so I know you're a very brave man. I want to make sure that we, like, figure out that talking is important, so we won't be able to talk. We'll take that away. So, no communication, no verbal communication at all. So we won't be able to talk. And Kirk, just to see how brave you are, I want you to keep your eyes closed for the entire time. (loud heckling from crowd.) Okay, you can't talk, and you cannot see. Alright, now is that okay? I guarantee that it'll be worth it. Is that okay?

KIRK: Sure.

SUZI: You said "Sure." Now, we know Kirk's a very brave man, but to agree to that, that tells me that he's probably very desperate for a physical experience. (Giggle) Now, Kirk, I want you to look that way, okay? And close your eyes right now. Don't move, 'cause you'll fall off. Close your eyes, cause I'm gonna go show the audience what it is I want you to do. So they'll know whether or not you're doing it. So close your eyes right now, okay? Okay? And don't open them. And don't cheat.

If you turn around and try to peek to see what I'm doing, I'll give you a kick right in the canolies. And I'm half Italian, and I know where they are Kirk, 'cause it's the bottom half that's Italian on me. Alright. (Giggle). Now stay there. Close your eyes. You people over here, you keep

watching him, and you yell if he starts to peek or anything, okay? And then I'll come back with my pointy toes. You stay right there, Kirk. I'll come right back to get you in just a second. 'Cause I want to show you all what it is I'm gonna try to get Kirk to do. And we'll see whether this kind of communication works. Fair enough?

You want to hold this for me while I do this, do this? (Gives microphone to child.) Don't worry, it doesn't vibrate. Okay. (Giggle) (crowd laughing)

This is what I want Kirk to do. (Demonstrates: lays down on stomach and does breast stroke.) (Crowd laughter.)

(Suzi then tries to get Kirk to lay down on his stomach and do the breast stroke with only non-verbal instructions. She grabs Kirk from behind around his abdomen, hands in front, and walks him forward. Then she bends him over and pulls him to the floor by his hands. Next, she pulls his legs out to force him to lay on his stomach and pushes him to the floor. She then stands astride him, with feet on either side of his waist, and moves his arms out to try to simulate the breast stroke. Suddenly, she falls forward so she nearly sits on his head. After recovering, she picks his legs up. He goes limp. She gives up, and gets the microphone back.)

SUZI: Kirk, are you awake? Hey, are you alive? Kirk, stand up. Look at me, talk to me, talk to me. We didn't do it, but it's not your fault. It was a very stupid way to try to communicate. So why don't we do it the old fashioned way? I'll show you and tell you what it was I wanted you to do, fair enough?

First of all, I wanted you to lie down on your stomach. That was pretty easy, so would you lie down on your stomach for me again, please? Just lie down. Great. Now,

I was trying to take your jello arms and make them go like the breast stroke, Okay? So just bring them out together and pull 'em back. Go ahead, just keep going. Fast, don't rush me. (Kirk complies.) Okay, nice and slow. Now make your legs go like a frog at the same time, like this, out to the side. Go ahead, ready? (Kirk complies.) Same time, go, go ahead and both at the same time, go ahead. (He gets it right.) That's what I wanted! Give him a hand. (Crowd cheering)

Alright, let me ask you a couple of questions. Were you a little, ah, like, concerned, like, a little confused about what it was I was trying to get you to do?

KIRK: Yeah.

SUZI: Were you a little embarrassed?

KIRK: No.

SUZI: No, not at all? Well, did you feel a little vulnerable spread eagled on the floor?

KIRK: Yeah.

SUZI: Okay. If you ever ask anybody to get in that position, you remember what that feels like, won't you Kirk? But the nicest thing is this: that was a very stupid way to try to communicate. The minute, the second, that I told you what it was I wanted, and how I wanted it, and where I wanted it, you were terrific. Give Kirk a great round of applause. Thank you.

Society, society tells us right now that we shouldn't talk during a sexual experience; that if you talk during a sexual experience, you'll ruin the spontaneity. You'll ruin the moment. I guarantee you, if you cannot talk during a sexual experience, you won't even get to the moment. If you can't look your partner in the eye and say, "Listen, I want to take all of your clothes off, and then I want to run my tongue on the back of your neck and work my way down..." If I

can't say that to my partner, I'm not ready to do it. I can't even kiss my partner unless I'm ready to tell my partner I would like to kiss him or her. If I can't talk to my partner about what it is I want to do, how I want to do, and where I want to do it, I'm not ready to do it. Right, John? If I can't say the words, I'm not ready to do the deed.

"Well, I'd be to embarrassed to say those things." Then don't do them yet. Wait till you can describe it. Wait till you can describe it. If you can't say the words, you can't do the deed. Doesn't that make sense? I mean, isn't it just a little bit of common sense? And society is trying to tell us not to do that. I'm not going to have sex in the dark under the covers with my eyes closed. And when I do [have sex], I'm going to tell the truth. I'm not going to fake anything. I'm not gonna lie about anything. If I--and you know what?

If I don't know if I want to do something, if I don't know if I want him to touch my breast, if I'm not sure while I'm making out with him, I'm not ready. If I even think that I'm not ready, I'm not. When I know I'm ready, I'll tell you. I'll be able to say to my [partner]: "Yes, we can take our clothes off; yes, we can do this; no, we cannot do this. I'm not ready." If I can't say the words, I'm not ready to do it.

Don't sit there and tell me, "Well, we do things, but we don't talk, but it seems to work out." I'm not gonna let it seem to work out. And I won't fake an orgasm for someone. I now know that I can get sexually satisfied without even taking my clothes off. I know that.

And the third one is trust.

And I'll show you in the last three minutes that we have, if I think that I'm ready to have intercourse, then I've got to be able to use a condom. I've got to go buy them myself, and no--I'll show you right now exactly how easy it

is to use a condom. Well, it's not that easy, actually. For some people it's very difficult. If it's difficult and you're embarrassed, then make sure you try it on yourself before you try it with someone else. I need a very brave young man, right now. Who's the bravest man that will come down here and allow me to work with a condom on? The, the guy in the grey. The guy in the grey shirt, come on down. Yeah, come on down, come on down. (Child comes down as crowd cheers.) Hurry up; we haven't got much time. I gotta get you out of here in two minutes; one minute.

What's your name? What is it?

JAMIE: Jamie.

SUZI: Jamie, come on over here, Jamie. Now Jamie, let's say Jamie and I were going out and we think we're ready to have intercourse. Alright? So, all of a sudden Jamie and I have to talk about this and say, "Jamie, listen. I gotta tell you something. I know that we were just making out and I thought we were getting really close to intercourse. I need to talk about this with you, fair enough?"

JAMIE: Fair enough.

SUZI: Alright. First of all, we're doing too much of this stuff in the dark under the covers with our eyes closed, so I want to put a little light on the situation. That fair enough?

JAMIE: Yeah.

SUZI: Second of all, I don't mind if we take some of our clothes off. Is that Okay?

JAMIE: Yes.

SUZI: Okay, we'll take some of our clothes off. And I want to keep rubbing and touching each other until we're both satisfied, until we both have an orgasm. Is that okay if we do that?

JAMIE: Excellent.

SUZI: Excellent! Excellent. She'll wing to you too. (Giggle) But I'm not ready for intercourse tonight. I know that. Now, you look a little disappointed. But listen, I know you're disappointed. But think about it. If we wait and learn how to satisfy each other without intercourse, we're better off, right? I mean, we at least know how to satisfy each other on the outside of our body. If we do have inside intercourse, we've got to learn how to use a condom first. I want to know more about condoms before we have intercourse, and I need to know more about you. I went shopping.

You hold this one. (Hands child a condom.) I'll hold this one. Okay? Hold yours up. Okay. (Jamie holds up the condom.) Yours is the steel belted radial one. I can see that. (Giggle) Alright, you hold this one.

JAMIE: Heavy Duty.

SUZI: Heavy duty. This is a latex condom. We can only use a latex condom. Can't use anything else. Now watch this one. We can use that one; that's latex too. I didn't buy anything other than latex. But watch; keep your eye on this condom. (Pulls applicator from the condom.) Two condoms in one? No. That's the condom.

You know what this is? It's a condom that comes with its own applicator, because, you know what? That's very difficult to roll down for some people. It slips out their hand, falls on the ground, and fills up with cat hair and dust. Which is a bummer, right? (Giggle) So, that won't--I mean, that one might--this one won't, 'cause we only roll it down one way.

By the way, if you ever see a penis shaped like that, don't play it, Okay?

This one also has a little bit of glue on the inside. Glue. It's gonna stick right to your wiener and its gonna stay

there. No, not for three days, though. It's not super glue. Okay? Alright. So that's for a vaginal intercourse, that's for vaginal intercourse, but this one is for oral sex. And I'll tell you right now I'm never gonna try anal intercourse. It's not what I'm into.

And this one is a dry condom. So if I have to put this on a wiener and put it in my mouth, you don't use a lubricated one and you don't use one with nonoxinal 9, which is a spermicide. That's good for vaginal intercourse but not for oral sex. I'm gonna try and taste this right now. Hang on. (She slowly licks the condom.)

You know what, Jamie? You're my partner, and you're supposed to be my boyfriend. Well wait, it's only-- Wait. It's only fair that you experience what I'm experiencing. (Crowd roars.) Why should I have to and you not? See the difference? You're asking me to do something that you wouldn't even do. I'm not asking you, I'm not asking you to put a wiener in your mouth. I'm asking you to take the condom to be a good sport for me.

(Jamie licks the condom.)

JAMIE: "Minty."

SUZI: What is it, is it sweet?

JAMIE: "No, it's minty."

SUZI: Yeah, but it's sweet.

JAMIE: "Yeah."

SUZI: Yeah, it's good isn't it? Yeah, I know, that's why I got it. So, see, you're a good sport. But I don't want to waste this condom, so we've got 30 seconds left.

Come here and kneel down. Kneel down and face the audience. (Jamie kneels down.) Face the audience. Okay. And, uh, I need you (referring to girl in the audience) to come up, because you helped me before. Come up very

quickly. Hurry up; we haven't got much time. (Child begins to come up.) Take your rings off, take your rings off. Come on, come on, come on, come on. Come on up here. If you don't wanna, you don't have to, but I want you to help me, okay?

Now, we're gonna show you that a condom works by putting a condom on Jamie's head. Is that Okay? (crowd cheers) Are you a good sport? Come on, here we go. What's your name?

NICOLE: "Nicole."

SUZI: Okay Nicole? Hold this. (gives her the condom.) Nicole, take your rings off very quickly.

NICOLE: "Oh, sorry."

SUZI: We gotta, we gotta move fast. And when you leave here after this, be careful; don't run into the next class that's coming down. No, you don't. We're just gonna prove that a condom will fit anybody, by putting it on your head.

Put your hands inside the condom (crowd roaring) the same way I do, all the way up to your wrist. (Nicole puts hands inside condom, and holds apart as one does a skein of yarn.) Very nice. Pull your hands apart; pull them apart; stay right there. Don't put your fingers through it. Down, over his head. (Nicole places the condom over Jamie's head, nose, mouth, and down to his chin.) Take your hand out; take your hands out.

NICOLE: "Sorry, sorry."

SUZI: Go ahead. Okay Jamie, put your head up. I want to do a great trick.

JAMIE: "Oh, no."

SUZI: Blow through your nose real hard, Jamie. Real hard. (Jamie inflates condom, still on head.) Come on, harder; blow it up. Come on, harder; blow it up. Come on, harder.

One more, big one. (Condom inflated like balloon above his head.) Take a deep breath...YES!!!! (Crowd cheers.) Take a bow, take a bow, take a bow.

Now, listen. Just because I put a condom on Jamie's head, that gives you no right to call him "dick head". (Crowd laughter.) Thank you Jamie; I appreciate it. You have to leave. You have to leave. Wait, wait, wait, wait. I only got 2 seconds. You have to leave; I want to tell you something.

When you go home and you tell your parents what went on here today, you tell them we did this--wait. You tell them we did this because we love you. And because we believe in you. And one year ago I found out that my brother is HIV positive. And I am 42 years old. I have a daughter older than you are; I would die if she ever left me. I believe in you.

Become sexually proud and confident people. Know how you work. Tell your parents about sex.

God bless you all, and remember, your school had the balls to bring me here, so you thank them. Thank you very much, and God bless you all.

(2)

Supreme Court, U.S.
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No. 95-1158

In the Supreme Court of the United States

OCTOBER TERM, 1995

RONALD C. BROWN, ET AL.,
PETITIONERS,
v.
HOT, SEXY AND SAFER PRODUCTIONS, INC., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether any constitutional right of parents to direct the upbringing of their children has been violated by mandatory attendance at a high school assembly for ninety minutes where they were exposed to hearing speech they regard as offensive but were not required to do anything else and where there is no prospect of further exposure.

2. Whether parents and their children in high school have a claim for violation of their right to procedural due process where the school committee has a mandatory, non-discretionary policy requiring without exception that they be given notice of an AIDS awareness assembly and the opportunity to opt out of attending but school officials failed to follow that policy on one occasion.

RULE 29.1 STATEMENT

Respondent Hot, Sexy and Safer Productions, Inc. is a California corporation with no parent companies or subsidiaries. Respondent the Chelmsford School Committee is a department of the Town of Chelmsford, Massachusetts, which is a municipal corporation with no parent companies or subsidiaries.

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In the
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petition omits critical, dispositive facts which were alleged in the Amended Complaint and upon which the District Court and the Court of Appeals relied. Paramount are that the AIDS awareness assembly attended by the two plaintiff[1] high school students lasted only ninety minutes; that neither student was required to do anything other than attend and listen; and that, immediately after the assembly, school

[1] Petitioners are referred to herein as "plaintiffs". Respondents, defendants in the District Court, are referred to herein either as "defendants" or by their titles or positions, e.g., "the school committee".

officials took steps to insure that their written Policy requiring an opportunity to opt out of attending would be followed for any similar programs in the future. [A.C. ¶¶ 2, 26, 41, 46, and Exh. D. p. 2].[2] Plaintiffs' ninety-six paragraph pleading made no allegation that the circumstances would be repeated or that the plaintiff students faced any prospect of systematic and required continuing exposure to speech such as occurred at the assembly. [A.C. ¶¶ 1-96].

Moreover, the Petition is apparently crafted to urge this court to review the content of the assembly. Therefore, it carefully culls selected passages from the alleged transcript which was annexed to the Amended Complaint. Plaintiffs, however, fail to acknowledge the numerous instances in which the performer warned the students about the dangers of drug, alcohol and tobacco use; admonished them against unprotected sexual activity; provided information about how the AIDS virus is transmitted; counseled the students to resist peer pressure to engage in casual sexual activity; stressed the importance of communication, honesty and trust in personal relationships; and urged them to talk with their parents. [Pet. at D-6-12, -28-29, -46, -51-52, -56, -61]. Defendants otherwise rely on the facts set forth in the opinions of the District Court and of the Court of Appeals.

The District Court ruled that none of the five substantive federal law claims in the Amended Complaint alleging "deprivation of privacy rights", "substantive due process", "procedural due process", "free exercise of religion" and "sexual harassment" stated a cause of action. [Pet. at A-5-20]. The District Court deferred entry of judgment and gave plaintiffs an opportunity to cure the defects in their Amended Complaint, but they failed to respond. Dismissal followed, as did an appeal. The Court of Appeals agreed with the District Court and affirmed. [Pet. at C-1-30]. Plaintiffs did not file a petition for rehearing or suggestion of rehearing en banc.

[2] References to the Petition and its Appendix are designated as "[Pet.]". Since plaintiffs were allowed to proceed on appeal without an Appendix, references to the Amended Complaint are designated as "[A.C. ¶]".

REASONS FOR DENYING THE PETITION

The Petition should be denied because this case raises no issues of such importance that this Court's intervention is required or appropriate; because the courts below have correctly decided the case; and because the Court of Appeals' decision conflicts neither with any decision by this Court or with any decisions by other courts of appeals.

I. NO IMPORTANT QUESTION OF FEDERAL LAW IS RAISED BY THE DISMISSAL OF PLAINTIFFS' ALLEGATIONS OF AN ISOLATED, LIMITED EXPOSURE TO SPEECH THEY CONSIDER OFFENSIVE, WHICH HAS NO PROSPECT OF REPETITION.

In formal deference to Supreme Court Rule 10.1(c), plaintiffs assert baldly that "this case presents questions of major importance to parents, students and public school officials nationally." [Pet. at 4]. In fact, it raises no important question of federal law which needs resolution by this Court. The Petition pivots on an isolated failure by local school officials to follow their own mandatory opt-out policy on one occasion. Plaintiffs complain merely that the students were exposed for ninety minutes to speech which they and their parents regard as offensive. There is no prospect of repetition. Although nearly four years have elapsed since the assembly, plaintiffs can point to no other cases involving like circumstances, nor can they assert additional violations of the policy in defendants' school system or violations of similar policies in any other school system. Instead, to support their argument plaintiffs trot forward only a single newspaper article. [Pet. at 4 n.1]. The District Court and the Court of Appeals each ruled on the insufficiency of the particular allegations made, or not made, in the Amended Complaint. [Pet. at A-2, -13, -17, -18; C-6, -10, -19, -25]. This Court should resist an invitation to grant the writ solely to decide whether these fact-specific

assertions included by plaintiffs in their pleading survive scrutiny under Fed. R. Civ. P. 12(b)(6).[3]

II. THE LOWER COURTS FOLLOWED THIS COURT'S PRIOR DECISIONS REGARDING THE RIGHTS OF PARENTS CONCERNING THEIR CHILDREN'S EDUCATION.

In another effort to bring this case within Rule 10.1(c), plaintiffs assert that the writ should issue because "[t]he judgments of the lower courts in the instant case are in direct conflict with prior important rulings of this Court which clearly established the fundamental nature of the constitutional right of parents and families to guide and direct the education and upbringing of their own children." [Pet. at 4]. Plaintiffs anchor their claim on two purported deviations from the holdings of this Court. First, plaintiffs assert, the Court of Appeals and the District Court ignored decisions by this Court recognizing a fundamental right of parents to direct the education and upbringing of their children. Second, plaintiffs argue, the lower courts failed to follow other cases decided by this Court permitting public officials to restrict sexually explicit speech. In fact, the courts below decided each of these questions in a manner entirely consistent with this Court's prior decisions.

Plaintiffs' contention that the Court of Appeals failed to properly acknowledge "the fundamental right of parents to direct the education and upbringing of their own children, a right which this court has consistently upheld" [Pet. at 5]

[3] The notion that such limited conduct as is alleged here implicates a national "weakening of the family" which mandates this Court's attention [Pet. at 4] is simply absurd. *See Lee* v. *Weisman*, 505 U.S. 577, 590-91 (1992) (distinguishing school prayer from offensive secular speech and expressing confidence in the ability of high school students to learn to endure offensive speech and to counter it). Even if the staging of the mandatory assembly warranted corrective action, the prompt response of school officials the very next day supplied a remedy.

relies on *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Meyer* involved a statute which mandated that parents send their children to public schools and prohibited enrollment in private schools. In *Pierce*, this Court struck down a statute making it a *criminal* act to teach any child below eighth grade in any language other than English. The Court of Appeals correctly noted that *Meyer* and *Pierce* stand for the proposition that the state does not have the power to "completely foreclos[e] the opportunity to choose a different path of education." [Pet. at C-13].

The holdings in *Meyer* and *Pierce*, however, do not "encompass[] a fundamental constitutional right to dictate the curriculum at the public school to which [parents] have chosen to send their children." [Pet. at C-13]. As the Court of Appeals observed:

> [i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater to a curriculum for each student whose parents had general moral disagreement with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* did not encompass a broad-based right to restrict the flow of information in public schools.
>
> *Id.*[4]

Nor do cases concerning the free exercise of religion, such as *Wisconsin* v. *Yoder*, 406 U.S. 205 (1970) [Pet. at 8], compel

[4] Plaintiffs' collection of decisions by this Court recognizing "the family" "as a right of first importance" [sic] [Pet. at 6] contains no cases even remotely suggesting that mere exposure to speech on one occasion implicates that right. *See, e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Santosky* v. *Kramer*, 455 U.S. 745 (1982); *Meyer*; *Pierce*.

a different result on this record. The Court of Appeals specifically found the allegations of the Amended Complaint to lie outside the narrow ambit delineated in *Yoder*. Plaintiffs' "free exercise claim" is "qualitatively distinguishable from that alleged in *Yoder*" [Pet. at C-24], which turned on a long-established and highly restrictive way of life. *Yoder* involved a convincing demonstration by the Amish defendants of:

> the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a Statute generally valid as to others.

[Pet. at C-25] [quoting *Yoder*, 406 U.S. at 235]. Plaintiffs, in contrast and despite three opportunities, have not alleged that "the one-time compulsory attendance at the Program threatened their entire way of life." [Pet. at C-25]. Indeed, the Amended Complaint is devoid of any details of plaintiffs' religious beliefs. Furthermore, like *Pierce*, *Yoder* upheld the right of the Amish to remove their children from public schools. It did not create a parental right to micromanage the curriculum in the public schools through lawsuits for damages.

Equally without merit is plaintiffs' suggestion that *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986) and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), create a constitutional cause of action for damages against local school officials. In *Fraser* and *Pacifica*, this Court ruled that, in certain circumstances, public officials may restrict offensive or vulgar speech. Those cases, as the Court of Appeals found, "uphold the *state's* limited power to regulate or discipline speech to protect minors from offensive or vulgar speech". [Pet. at C-14] [emphasis added]. No decision of this Court, however, *requires* public officials to insulate students from exposure to offensive language or subjects them to a private

right of action when they fail to do so. Thus, the Court of Appeals properly affirmed the District Court's conclusion that "these cases 'do not create a private cause of action against state officials for exposure' to patently offensive language." [Pet.at C-14].[5]

On the record before this Court, "parental notification and consent" [Pet. at 12] are plainly not constitutional requirements. Plaintiffs have failed to cite a single decision of this Court or of any court of appeals holding that school officials are liable for failure to give prior notice or obtain parental consent for a one time assembly. The state court authorities on which plaintiffs rely (referred to as "cases from varying circuits" [Pet. at 12-14]) similarly do not hold that an "opt-out opportunity" is constitutionally mandated. These cases address ongoing curricular requirements or continuing school programs and hold that, in some circumstances, parental notification and consent will negate any constitutional objections. The record here, involving one time attendance at a single school assembly and no particularized showing of harm to religious beliefs, does not compel or support the sweeping extension of this Court's prior decisions which plaintiffs seek.

III. THE COURT OF APPEALS' HOLDING THAT SCHOOL OFFICIALS' ISOLATED FAILURE TO FOLLOW THE SCHOOL COMMITTEE'S MANDATORY OPT-OUT POLICY WAS A RANDOM, UNAUTHORIZED ACT IS IN COMPLETE HARMONY WITH THE STANDARDS FOR PROCEDURAL DUE PROCESS CLAIMS ESTABLISHED BY THIS COURT.

The Petition asserts that the lower courts resolved plaintiffs' procedural due process claim in a way which conflicts with

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[5] Plaintiffs also cite *Vernonia School District* v. *Acton*, 515 U.S. ___, 115 S.Ct. 2386 (1995) [Pet. at 10]. *Vernonia*, however, was decided in a vein similar to *Fraser* and *Pacifica*, and held merely that the *state* could subject students to drug testing in certain circumstances. 115 S.Ct. at 2396.

Zinermon v. *Burch*, 494 U.S. 113 (1990). Both courts concluded that school officials' failure to follow the mandatory opt-out provision in their own Policy was a "random, unauthorized act" for which plaintiffs could not recover under 42 U.S.C. § 1983. [Pet. at A-11-14, C-14-20]. *See Parratt* v. *Taylor*, 451 U.S. 527, 543 (1981); *Hudson* v. *Palmer*, 468 U.S. 517, 533 (1984). Those rulings were correct.

Initially, plaintiffs concede that the school committee's Policy concerning the health curriculum is the state law source of any liberty interest which the plaintiff students might have in avoiding mere exposure to "lewd and indecent communications". [Pet. at 16; A.C. ¶ 46].[6] *See Kentucky Dep't of Corrections* v. *Thompson*, 490 U.S. 454, 461-64 (1989) [citations omitted]. The Policy provides that "[p]ositive subscription, with written parental permission, *will* be a *prerequisite*." [A.C. Exh. D p. 1] [emphasis added]. It vests no discretion or judgment in school officials and permits no exceptions. Plaintiffs acknowledge that the Policy's procedures were imperative. [Pet. at 16, 19]. Notwithstanding these critical concessions, plaintiffs argue that the lower courts wrongly decided their claim because school officials' violation of the mandatory Policy on this occasion was "foreseeable". [Pet. at 16].

Plaintiffs' misunderstanding of the *Parratt-Hudson* doctrine and of *Zinermon* is evident from their own characterization of defendants' conduct. Rather than arguing that the Policy delegated any discretion to school officials, plaintiffs assert that those officials "made a deliberate policy decision to disobey their own fundamental procedures". [Pet. at 19].[7] In *Zinermon*, this court held that a procedural due process claim was not barred by *Parratt-Hudson* where the deprivation

[6] Defendants have at all times assumed that the Policy applied to the assembly solely for the purposes of their motion to dismiss.

[7] In fact, as plaintiffs admit, if the Policy had been followed they not only would have received predeprivation due process but would have been able to avoid the alleged deprivation altogether. [Pet. at 16].

was foreseeable and where it was possible to require predeprivation procedures but where, nonetheless, the state had chosen to give state officials "broad power" and uncircumscribed discretion. 494 U.S. at 135-38. *Zinermon*, however, also anticipated claims like plaintiffs', and strongly indicated that such cases fall within the "random, unauthorized act" exception. Accordingly, this Court drew an express (and explanatory) comparison between the circumstances in *Zinermon* and situations where state actors were bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards. 494 U.S. at 137. The lower courts construing *Zinermon* are therefore in agreement that the *Parratt-Hudson* bar applies where the state provides mandatory predeprivation procedures but the state actor simply ignores them. *See Lowe* v. *Scott*, 959 F.2d 323, 343 (CA 1 1992); *Hartwick* v. *Board of Trustees of Johnson County Community College*, 782 F.Supp. 1507, 1514 (D. Kan. 1992) (a state rule directing officials " 'to hold a hearing before violating any rule or regulation would be senseless' " [quoting *Katz* v. *Klehammer*, 902 F.2d 204, 207 n.1 (CA 2 1990)]).[8]

Nor do plaintiffs gain any mileage from the fact that the implicated state actors included policymakers, i.e., school committee members. [Pet. at 17, 19]. As the District Court found, plaintiffs made "no allegation that any one of [the committee members], or all three acting together, were authorized to circumvent a policy adopted and enacted by the committee as a whole." [Pet. at A-14]. At least two other courts of appeals have concluded that even the involvement of a policymaking official in the state's failure to follow its own

[8] Throughout this litigation, plaintiffs have emphasized that the assembly was not the result of a carefully planned process and therefore was not in that sense "random". [Pet. at 17-18]. As both the District Court and the Court of Appeals pointed out, however, their focus is wrongly placed because their claim turns on an unpredictable and unforeseeable failure to follow the required opt-out procedure in the Policy. [Pet. at A-14, C-19].

procedures does not take a due process claim outside the *Parratt-Hudson* rule. *See Easter House* v. *Felder*, 910 F.2d 1387, 1400-05 (CA 7 1990), *cert. denied*, 498 U.S. 1067 (1991); *Johnson* v. *Louisiana Dep't of Agriculture*, 18 F.3d 318, 321-22 (CA 5 1994).

Plaintiffs cite no decisions to the contrary but rely, instead, on a doctrine of municipal liability under § 1983 which is simply irrelevant to this case. The Petition asserts that "[e]ven a solitary action taken by a person in a position of authority may be deemed the policy of a municipality, giving rise to municipal liability". [Pet. at 18] [citing *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 470 (1986)]. This rule is derived from *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978) and its progeny, and holds that although a municipality is only liable for civil rights violations if those violations result from an official municipal "policy or custom", the actions of a policy-making employee can satisfy that standard. The "random, unauthorized act" exception, however, applies exclusively to procedural due process claims and is not concerned with *who* may be found culpable but, rather, with *when* culpability attaches. The school committee does not dispute that if there had been no policy, or if it had a policy which vested substantial discretion in school officials, the actions of at least the committee could bind the municipality under § 1983. The entirely different question at bar, however, is whether anyone can be held liable in a § 1983 action where the state has put in place required predeprivation procedures and there has been an unauthorized failure to use those procedures.

The decision of the Court of Appeals does not conflict with any decision of this Court, either directly or in principle. Nor does the Petition identify any conflict between the decision of the Court of Appeals and those of other federal courts. Instead, the court correctly decided this case under well-

established standards.[9,10]

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

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[9] Plaintiffs point to a possible alternative state law source for their liberty interest, citing M.G.L. c. 71, § 1. [Pet. at 16 n.3]. In pertinent part, that statute gives a student an absolute right to opt out of "instruction on disease" if his parent or guardian objects in writing on the grounds that such instruction "conflicts with his sincerely held religious beliefs". Like the Policy, it delegates no discretion or judgment to school officials. Therefore, even if § 1 controls rather than the Policy, plaintiffs' procedural due process claim suffers the same fate.

[10] Plaintiffs never contended that the State does not provide an adequate postdeprivation remedy. [Pet. at A-14, C-20]. *See Hudson*, 468 U.S. at 534-35.

No. 95-1158

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In The

Supreme Court of the United States

October Term, 1995

RONALD C. BROWN, SUZANNE M. BROWN, JASON P. MESITI, by next friends Ronald C. Brown and Suzanne M. Brown, *et al.*,

Petitioners,

v.

HOT, SEXY AND SAFER PRODUCTIONS, INC., SUZANNE LANDOLPHI, THE CHELMSFORD SCHOOL COMMITTEE, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In their Opposition to Petition for Writ of Certiorari ("*Opp.*"), Respondent school officials contend that they did nothing wrong, that they only did it once, and that they would not do it again. In reality, they have already done it again. *See* Section III, *infra.*

Petitioners' constitutionally protected rights should not be dependent on the largesse of government officials who use their authority to circumvent their own policies.

The so-called "mandatory opt-out policy" did not prevent the school committee and the highest-ranking officials in the school from forcing every student to attend the Hot, Sexy and Safer performance. There is nothing to prevent these officials from circumventing their own policy again, whenever it suits them.

This case raises claims involving the fundamental rights of parents to direct the upbringing and education of their children. Yet the lower courts decided the case without even the benefit of a trial. For this Court to ratify the cavalier way in which the lower courts dismissed Petitioners' Amended Complaint would empty of meaning the long line of precedents recognizing and protecting these fundamental rights of parents.

I. Important Questions of Federal Law, Potential for Repetition, and Conflict with Supreme Court Precedent

Respondent school officials present a distorted characterization of their conduct, and of the Hot, Sexy and Safer performance. Their Opposition echoes the misinformation which the school officials dictated to Petitioner students in the profane and sexually explicit exhibition which advocated that students engage in premarital heterosexual and homosexual

conduct.[1] In contrast, Petitioners have provided an Appendix containing a transcript of the entire Hot, Sexy and Safer performance. This Court is urged to review the Hot, Sexy and Safer transcript in its entirety, in order to discern the true context of the forced presentation and its intended effect on adolescents who are at that vulnerable age when attitudes toward sexual morality are formed. (*See Pet.*, Appendix D).

The Hot, Sexy and Safer performer told the students: " 'Hey, I'll take your brother or your sister. It doesn't matter to me. I don't care.' (Giggle) 'Alright? So, that's a bi-sexual, alright?' " *Pet.* at D-19. During one of her "experiments" involving breast size and suction noises made by sweaty bodies, the performer wagered that " 'when two women are together they make huge noises, right?' (Giggle) . . . 'And when two guys are together, they'll make little noises.' " *Pet.* at D-32. Respondent performer instructed the students that "most young men will experience their first orgasm with another guy." *Pet.* at D-46. The students were forced to watch as a male student knelt down before them, while licking Respondent performer's condom in simulation of oral sex. *Pet.* at D-59, 60.

Respondents are arrogantly mistaken in their argument that this Court's precedents justify their coercive conduct. In their Opposition they suggest that by forcing attendance at such a performance high school students can "learn to endure offensive speech and to counter it." *Opp.* at 4, n.3. Petitioners submit that this is nothing more than a self-serving misinterpretation of precedent.

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[1] For example, the students were told that there are thousands of ways to "sexually satisfy myself and my partner without intercourse." *Pet.* at D-46. The performer's instruction on "communication" during sexual intercourse was based on a long and degrading discussion of excretory functions. *Pet.* at D-31.

Respondent school officials maintain that the longstanding Constitutional protections regarding indecency and explicit sexual conduct do not apply to the hours a minor child spends under the authority of public school officials. Respondent school officials intimate that Supreme Court precedent has vested them with discretion to decide whether to "insulate" students from performances such as Hot, Sexy and Safer or alternatively, to force the students to endure such performances. *Opp.* at 6, 7.

Petitioners submit that it would be unconscionable for this Court to uphold a ruling which shields the school committee and its highest ranking officials and administrators from accountability for forcing a profane and sexually explicit performance on a captive and unsuspecting audience of students, while at the same time maintaining that students themselves may be disciplined for uttering sexually explicit innuendo. Respondent school officials are asking for license, as well as judicial endorsement of a double standard: The bigger you are, the softer you fall.

The balance of interests between parents and public school officials has been completely disrupted by the opinions of the lower Federal courts which have ruled on the instant case. When parent Petitioners sought to protect their children from profanity and degrading portrayals of sexual and excretory functions, the lower courts dismissed their claims as seeking "to restrict the flow of information in the public schools." *Pet.* at C-13. The Court of Appeals decision also made a point of casting doubt on Supreme Court precedent which established the fundamental nature of the parental right to direct the upbringing and education of their children. *Pet.* at C-12. Further, the appellate court's decision suggested that public school officials in the United States need not concern themselves with the Free Exercise Clause of the Constitution,

as long as they label their official actions (no matter how shocking) as "curricula" activities. *Pet.* at C-21, n.11.

The arrogance of Respondent school officials remains unchecked, and the decisions of the lower courts reinforce their view that public schools in America are enclaves of authority where parents and students have no remedy or redress for deprivations of federal civil rights.

II. Concerted Violation of Petitioners' Procedural Due Process Rights

By promulgating its policy on "health education continuum," the Chelmsford School Committee acknowledged the parents' right to direct their childrens' upbringing and education regarding human sexuality.

There is a "rich variety of ways in which the power of government is distributed among a host of different officials and official bodies," and "[p]olicymaking responsibility is shared among more than one official or body." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25, 126 (1988).

The group of school officials named as defendants in this case had the power to plan the profane and sexually explicit performance for weeks and months in advance, and the power to force students to attend Hot, Sexy and Safer, without giving notice to parents or obtaining the required consent.

How these school officials distributed, delegated and shared their powers, and whether and how they decided their performance did not fall under the purview of the "health education continuum" has never been explained, and therefore is most certainly capable of repetition.[2]

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[2] An after-the-fact Memorandum dated April 9, 1992 indicates that Respondent school superintendent Moser did have the power to make policy, to direct the school principal regarding forced attendance of

There are "numberless factual scenarios that may come to light in litigation," including local ordinances and regulations such as the policy at issue in this case. *Praprotnik*, 485 U.S. at 125. The factual scenario offered by Respondents school committee and school officials is that all of them were unauthorized to plan and carry out the Hot, Sexy and Safer performance. *Opp.* at 8, 9, 10, citing *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984). Respondents claim that their coercive conduct constituted a "random and unauthorized act." Their reasoning, like that of the lower courts, is flawed.

Respondents school committee and school officials suggest that *Zinermon v. Burch*, 494 U.S. 113 (1990), stands merely for the proposition that *Parratt-Hudson* is triggered when "the state [chooses] to give state officials 'broad power' and uncircumscribed discretion." *Opp.* at 9. However, *Zinermon* stands for a much broader principle. Respondents' conduct comes within the parameters of *Zinermon* because "[t]he State delegated to them the power and authority to effect the very deprivation complained of here, . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against" the unlawful conduct. *Zinermon*, 494 U.S. at 138. The lower courts misapplied the holding in *Zinermon*.

In their efforts to reconcile the Court of Appeals opinion in the instant case, Respondents argue that "two other courts of appeals have concluded that even the involvement of a policymaking official in the state's failure to follow its own procedures does not take a due process claim outside the

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students at sexually explicit assemblies, and to determine whether such assemblies came under the "health education continuum." Amended Complaint Ex. D at 2. The Memorandum raises factual questions, including whether Respondents had previously deemed the Hot, Sexy and Safer performance outside the continuum.

Parratt-Hudson rule." *Opp.* at 9-10, citing *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Johnson v. Louisiana Dept. of Agriculture*, 18 F.3d 318, 321-22 (5th Cir. 1994).

Respondents' argument is misleading. In *Easter House*, the power to effectuate a due process deprivation, and the responsibility for preventing such deprivation, was vested in two separate entities. *Easter House*, 910 F.2d at 1402. In the instant case, and in *Zinermon*, a single entity was responsible to establish and enforce the procedural scheme, and a single entity violated the Petitioners' rights to procedural due process. Respondents easily understood that an "erroneous deprivation [would] occur . . . at a specific, predictable point," (*Zinermon*, 494 U.S. at 136), and they withheld notice of the Hot, Sexy and Safer performance from parents. This Court should not allow Respondents to "escape liability by invoking *Parratt* and *Hudson*." *Zinermon* at 135.[3]

Petitioners have stated a claim which is exactly the type of foreseeable violation of due process which this Court in *Zinermon* sought to remove from the *Parratt-Hudson* exception.

The truth about Respondents' actions in respect of the performance at Chelmsford High School remains undisclosed, and in the control of Respondent school officials. They never answered the Amended Complaint, and the case was

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[3] Even in a pre-*Zinermon* case, it was held that "the single act of a sufficiently high-ranking policymaker may equate with or be deemed established state procedure." *Matthiessen v. Board of Education*, 857 F.2d 404, 407 n.3 (7th Cir. 1988). The Court of Appeals recognized that conduct of high ranking policymakers may be considered officially authorized action, even though a school board's "alleged action was not pursuant to the School Code, but in contravention of it, and thus would *seem* not to be pursuant to established state procedure." *Id.* (emphasis added).

dismissed before light could be shed on the extent and nature of the authority which was used to deprive Petitioners of procedural due process.[4]

Petitioners did, in fact, allege in their Amended Complaint that each Respondent was responsible for official policy making and for the Constitutional deprivations suffered by Petitioners. Amended Complaint at ¶¶ 38, 48. Petitioners alleged that the individual school officials had the power and discretion to authorize an assembly, hire a performer, define the topic, require mandatory attendance by all students, and to withhold disclosure and warning to parents in violation of their rights to procedural due process.

Respondents had authority over the very interpretation of the school committee policy, and whether Hot, Sexy and Safer was even considered a "curricular offering on health." Respondent school committee itself may be held liable if Petitioners prove that the Committee had delegated final decision-making authority regarding the so-called "continuum" to the school superintendent, school principal, or other school officials named as defendants. *Howlett by and through Howlett v. Rose*, 496 U.S. 356, 359 n.2 (1990)

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[4] It is striking that Respondents quote the District Court's conclusion that Petitioners made " 'no allegation that any one of [the school committee members], or all three acting together, were authorized to circumvent a policy adopted and enacted by the committee as a whole.' " *Opp.* at 9, quoting District Court, *Pet.* at A-14. There are five members of the school committee. Three constitute a majority, authorized under state law to set school policy. Mass. Gen. Laws ch. 71, § 37 (1995). *See Pet.* at 15-16. The notion that members of the school committee were not authorized to disregard a policy they themselves established is preposterous. To dismiss the case on so technical a pleading requirement does not construe the Amended Complaint so " 'as to do substantial justice.' " *Conley v. Gibson*, 355 U.S. 41, 48 (1957), quoting Fed. R. Civ. P. 8(f).

(reinstating former high school student's § 1983 claim against school district).

Whether Respondent school committee officially sanctioned or ordered the Hot, Sexy and Safer performance, or delegated final policymaking authority regarding sexually explicit assemblies to Respondent officials, is a question of state law which the trial court must decide in light of all the facts of the case. *Praprotnik*, 485 U.S. at 123, citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-83 (1986).

The trial court in the instant case failed to examine the true extent and nature of Respondent public officials' authority, as it is required to do in a case involving Constitutional deprivations by public officials, including violations of procedural due process. *Praprotnik*, 485 U.S. at 125-26. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir. 1995) (plaintiff is entitled to show that an official's conduct was a deliberate policy choice, or that an official policymaker delegated authority to a subordinate).

III. Remedies

Respondent school officials arrogantly state that "[e]ven if the staging of the mandatory assembly warranted corrective action, the prompt response of school officials the very next day supplied a remedy." *Opp.* at 4 n.3. The "remedy" is apparently the after-the-fact memorandum discussed above (*see* note 2).

However, the after-the-fact memorandum of Respondent Moser does not justify dismissal of the instant case. *See* note 2, *supra*. There was no prompt response by school officials to their concerted violations of federally protected rights. Respondent school officials planned the performance, and withheld disclosure from parents for weeks, or even months. They attended and supervised the forced attendance of students at two performances of Hot, Sexy and Safer.

Amended Complaint, ¶¶ 2, 38, 46-49. Rather than curtail the forced attendance of Petitioner students at the ninety-minute performance, Respondent school officials supervised a repeat performance, again with forced attendance. Amended Complaint ¶¶ 25-27.

Further, and significantly, Respondent school officials destroyed video tapes of both performances after their conduct became known in the community. Amended Complaint ¶ 33. The reality is, therefore, that Respondent officials' concerted and continuing course of conduct, in disregarding the rights of students and parents, demonstrates the likelihood for repetition.

Respondents' arrogant assertions of their supremacy in matters of constitutional decision-making, their blatant disregard of their responsibilities, and their refusal to accept accountability in regard to their actions, poses a significant risk of repetition should the decisions of the lower courts in the instant case be allowed to stand.

Declaratory relief is not only justified by the facts in the instant case, it is appropriate. Further, the decisions and conduct of Respondent school officials embody a policy choice for which Respondent school committee may be liable in damages. Petitioners' emotional distress is compensable under § 1983. *Carey v. Piphus*, 435 U.S. 247, 262 (1978).

In light of the inability of Respondents to carry out their duties without grossly distorting the constitutional protections afforded Petitioners and the policies promulgated by Respondent officials, the need for plenary review by this Court is indisputable.

Respectfully submitted,

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